BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	**)**	
	)	
Implementation of the Local	**)**	**CC Docket No. 96-98**
Competition Provisions in the	**)**	
Telecommunications Act of 1996	**)**	

COMMENTS OF SPRINT CORPORATION

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Sprint Corporation submits its comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("Notice") released in the above-captioned proceeding on April 16, 1999 (FCC 99-70).

I. INTRODUCTION AND SUMMARY

This proceeding is occasioned by the Supreme Court's remand of but one aspect of the Commission's Local Competition Order ("LCO")[1] in AT&T Corp. et al., v. Iowa Utilities Board et al., 119 S.Ct. 721 (1999). Sprint regards the Local Competition Order as perhaps the finest single piece of work ever done by this Commission in its 65-year history. Operating under a severe statutory deadline of six months, the Commission took a complex and often confusing piece of legislation and transformed it into a set of rules that represented a bold vision for the implementation of local competition – perhaps the key objective of the 1996 Act. The Commission there recognized that a framework of uniform national rules, to be effectuated in partnership with state regulatory commissions, is necessary if the 1996 Act's vision of opening the local telephone market to competition is ever to become a reality.

[1] First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted).

In many respects, the approach taken in the 1996 Act to opening the local market is akin to trying to make water flow uphill: it will never happen by itself. Rather, it takes a lot of oversight and continual regulatory prodding to require incumbent monopolists, that have little or no incentive to give up their market power,[2] to take the steps required by the Act to open their markets to competition and their networks to competitors. Operating in an inside-the-beltway political milieu that, for many years now (and through administrations of both major political parties), has had a knee-jerk predilection for "deregulation," the aggressive, pro-active regulatory framework constructed by the Commission in the Local Competition Order is an exemplar of intellectual honesty and political courage. After the RBOCs' headlong and largely successful assault against the LCO in the Eighth Circuit,[3] the Supreme Court's decision upholding all but one aspect of the LCO has to be regarded as a stunning, satisfying and richly-deserved victory for the Commission.

It is that one issue remanded by the Court – namely, the standard for determining when unbundled network elements (UNEs) need to be made available to competitors – that is the subject of the Notice. In the Notice the Commission has bent over backwards to ensure that it is asking all conceivably relevant questions in an effort to give content to the "necessary" and "impair" clauses of §251(d)(2) that the Court found lacking in the LCO. As will be discussed in greater detail below, the Commission can give appropriate consideration to the "necessary" and "impair" clauses without in any way detracting from the concept in the LCO that there should be a minimum national set of UNEs that all ILECs should be required to make available. After

[2] Although RBOCs have the added incentive of long distance entry if they open their local markets, their behavior to date supports the self-evident proposition that holding onto a monopoly is a better business proposition than forsaking that monopoly in order to enter what is already a fiercely competitive market.

[3] Iowa Utilities Board v. FCC, 120 F.3rd 753 (8th Cir. 1997) (subsequent history omitted).

giving due weight to the "necessary" and "impair" clauses, and other relevant factors, the Commission should continue to require all the elements previously codified at §51.319 of the Rules. In addition, with the benefit of additional experience since the LCO was issued, and the technological and marketplace advances that have occurred since that time, additional UNEs, primarily related to broadband service capabilities, should be required as well.

The Notice also raises a number of questions on how and when UNEs should be removed from the mandatory baseline list. Because of the infancy of UNE-based (and facilities-based) local competition, these questions are premature. It is simply impractical today to devise a rational and fact-based mechanism to remove UNEs from the baseline list, when the circumstances that might justify such action are on a distant horizon. Sprint can understand the Commission's desire to deal with these issues comprehensively. But what is important today, if the objectives of the Act are to be achieved, is to end the uncertainty and fill the vacuum created by the Court's vacatur of §51.319. In addition, in order to allow competitive carriers to make business plans and investments – and to permit consumers to enjoy the benefits of UNE-based local competition – a reasonable assurance of stability in the availability of UNEs is needed. Thus, the Commission should announce its firm expectation that the minimum list of UNEs would continue to be available nationwide for a commercially relevant period of time, e.g., five years. Before addressing these issues in more specific detail, it is relevant to review what has happened in the local marketplace since the LCO was issued.

It is undeniable that a lot of time, energy and effort have been expended – both by ILECs and CLECs – in attempting to make local competition a reality. Despite these efforts, local

competition is, as Chairman Kennard so aptly described it, "nascent."[4] Based on the most recent data available,[5] competitors have not yet made any major inroads in the local market. In 1997, CLECs and other local competitors accounted for only 1.2% of the total local services to end users (id. at 5). By mid-1998, CLEC resale of ILEC local service accounted for 2.36 million access lines – just 1.5% of total ILEC lines (id., Table 3.1). More significantly for purposes of this proceeding, CLECs (again by mid-1998) were employing only 244,000 UNE loops – just 0.1% of the ILEC total (id., Table 3.5). Sprint suspects that the level of local competition today is far less than either would-be CLECs or the ILECs projected at the time the 1996 Act was passed. In fact, a study released by the Yankee Group in December 1995 – on the eve of passage of the 1996 Act – projected that the RBOCs would lose 12.5% of their local consumer household market within 18 months after local entry began.[6]

The reasons for the slow start of the competition are numerous and complex. First, it is fair to say that entering the local market through any means, even simple resale of ILEC service, is a more complex undertaking than even a company like Sprint, with its extensive experience in the local market, realized at the time of the 1996 Act's passage. The critically important interaction with the operational support systems (OSS) of the ILECs, both in terms of developing standard electronic interfaces with the ILECs' systems and ensuring that the ILECs have the capability to reliably process commercial quantities of service orders from CLECs, continues to be a major stumbling block. Sprint, and other competitive IXCs that first entered the long

[4] Statement of Chairman Kennard before the Senate Judiciary Committee, Subcommittee on Antitrust, Business Rights and Competition, on State of Competition in the Telecommunications Industry Three Years After Enactment of the Telecommunications Act of 1996, February 28, 1999, at 7.

[5] Industry Analysis Division, CCB, "Local Competition," December 1998.

[6] Yankee Group, "IXCs versus RBOCs: The Battle of the Century," December 1995 (URL: http://144.223.14.204/yoln/216e.html), Exhibit 2.2.

distance market before equal access, necessarily had to offer a quality of service inferior to AT&T's. Once a perception is created in the public's mind that a carrier's services are inferior, it is difficult and takes a long time to overcome that perception. As in other areas of human endeavor, first impressions count. Because of this history, Sprint (and, Sprint suspects, many other would-be CLECs as well) is reluctant to enter the local market on a large scale until these operational problems are resolved to the point that it can hit the ground running with service quality at least equal to that of the incumbent LEC.

The Eighth Circuit's decisions and orders also undoubtedly had a stifling effect on local competition, in two respects. First, the legal uncertainty that was created from the time the Eighth Circuit entered its first stay of the LCO until the Supreme Court issued its decision early this year, made it difficult for CLECs to build business cases for a local entry strategy. Moreover, substantive determinations of the Eighth Circuit – such as allowing ILECs to physically separate UNEs that were already combined in their network – allowed intransigent ILECs to artificially increase the cost and difficulty of pursuing UNE-based entry strategies.

In short, local competition is not appreciably farther along now than it was when the LCO was issued. Despite the overwhelming affirmation of the LCO in the Supreme Court's decision, the remand of the UNE issue on very narrow grounds has enabled intransigent ILECs to prolong much of the uncertainty created by the actions of the Eighth Circuit. Despite promises from ILECs that they would continue to make available the UNEs defined in the original §51.319 and existing interconnection agreements until completion of proceedings on remand from the Supreme Court,[7] and despite the Court's affirmance of §51.315(b) (prohibiting ILECs from

[7] See e.g., letter dated February 12, 1999 from William P. Barr of GTE to Lawrence Strickling, Chief, Common Carrier Bureau.

separating already-combined UNEs) and the Commission's most-favored-nation rule (§51.809), at least one major ILEC, relying on the Court's vacatur of §51.319, has refused to allow Sprint to adopt UNE-related provisions of its agreements with other CLECs, claiming that "any provisions [in the agreements] requiring GTE to provide UNEs are nullified" and insisting that Sprint not seek " 'already bundled' combinations of UNEs."[8]

Despite the spin attempted by some ILECs,[9] the Supreme Court decision was not a "smashing victory" for the RBOCs and GTE. Rather it was a smashing victory for the aggressive, yet sound, pro-competitive policies adopted by the Commission in the LCO. The RBOCs and GTE will likely use this remand proceeding to attempt to make UNEs as difficult to get and use as possible. The Commission must not fritter away the fruits of its victory, and let the preposterous claims of victory by the RBOCs and GTE become a reality, by retreating now when no retreat is necessary or called for. Instead, the Commission should promptly consider how to give the necessary content to the "necessary" and "impair" clauses and should move forward with an expanded nationwide list of mandatory UNEs reflecting such content.

II. DISCUSSION

The outcome of this proceeding will have a major effect on Sprint in two respects. Sprint's long distance unit is responsible for its competitive local entry strategies, and is now in the process of launching Sprint ION, an integrated broadband service that will accommodate both local and long distance voice, data and Internet traffic. At the same time, Sprint has ILEC operations in 18 states, totaling more than seven million access lines, and is the largest ILEC

[8] See letter dated May 6, 1999 from Connie Nicholas, GTE's Assistant Vice President, Wholesale Markets-Interconnection, to Andrew M. Jones of Sprint, p. 2. This letter is attached as Appendix A.

[9] See Telecommunications Reports, February 1, 1999, at 4.

other than the RBOCs and GTE. Sprint thus approaches the issues in this proceeding as a CLEC that wishes to take advantage of the opportunity to use UNEs in an economical and efficient fashion, and as an ILEC that will be subject to the unbundling requirements that will be imposed in this proceeding. The positions Sprint takes below fairly reflect the needs of CLECs yet do not impose unreasonable burdens on ILECs.

Shortly after the Supreme Court issued its decision, AT&T, on February 11, 1999, made an ex parte filing attaching a white paper entitled "Remand Proceeding on Rule 319" (hereinafter "AT&T White Paper"), detailing (1) its views on important aspects of the LCO that were left intact by the Court; (2) the proper interpretation of the "necessary" and "impair" clauses of §251(d)(2) in light of the Court's decision; (3) how that interpretation applies to the various UNEs previously adopted in §51.319; and (4) additional refinements to UNE definitions that should be made. There is no point in reinventing the wheel. Sprint believes the analysis in the AT&T White Paper is sound, and will rely heavily on the White Paper in these comments.

A. Identification of UNEs On A Nationwide Basis

The Commission was entirely correct in observing (Notice, ¶14) that the Supreme Court's decision does not call into question the Commission's previous determination to establish minimum national unbundling requirements. In the proceedings before the Court, some ILECs argued for a market-by-market, carrier-by-carrier approach to the unbundling of elements (AT&T White Paper at 3), but the Court did not in any way give credence to that argument. On the contrary, the Court assumed that after these remand proceedings, the required elements would be "unconditionally available" (119 S.Ct. at 736).

The reasons previously advanced by the Commission for adopting a minimum specific list of elements that must be unbundled, summarized in ¶13, were sound when they were adopted and remain sound today. Thus, Sprint fully supports the Commission's tentative conclusion (in ¶14) that it should continue to establish a minimum set of network elements that must be unbundled on a nationwide basis. Local competition today is in such a state of infancy that it is fruitless even to consider, at this time, any form of geographic differentiation in the baseline set of elements. For the reasons discussed in the Introduction, above, the fact that the Commission is reexamining its minimum list of elements three years after the passage of the Act is relevant only to the extent that the need for a minimum, nationwide list is every bit as pressing today as it was when the Commission first addressed this issue.

Sprint supports the Commission's determination (¶14) not to eliminate the states' authority to impose additional unbundling requirements consistent with the criteria it will adopt in this proceeding. However, it is quite another thing for the states to attempt to relieve an ILEC of the obligation to provide the elements that are on the minimum national list. The Commission cannot delegate its rulemaking authority to the states.[10] Nor can the states, in arbitrating or approving an arbitrated agreement, deviate from the Commission's rules. See §252(c)(1) and (e)(2)(B) of the Act. Attempting to give states the authority to decide, in the first instance, whether a particular element need not be unbundled in light of its availability from other sources in that state would be tantamount to no federal minimum requirements at all. Yet Congress clearly gave the Commission the central role in administering the Act. As the Court observed (119 S.Ct. at 730, n.6):

[10] Section 5(c) of the Act permits delegations of authority only to panels of commissioners, individual commissioners, employee boards and individual employees.

> The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

There is no policy reason for the Commission to introduce such "strangeness" into its regulatory scheme. As will be discussed in Subsection I, below, when the time is ripe to consider waivers from, or amendments to, the list of required UNEs, the Commission may well wish to invite the views of the relevant state commissions as to whether there are sufficient grounds for waiving the national rules, but it would rend the very fabric of the 1996 Act for the Commission to delegate to the states the right, in the first instance, to "regionalize" the national requirements.

B. What is "Proprietary"?

In Sprint's experience, access to "proprietary" UNEs has not been a significant source of controversy between ILECs and CLECs. The Commission should take whatever steps are necessary to ensure that this continues to be the case. As will be discussed in E., below, it is possible to employ a stricter test for making "proprietary" elements available than for non-proprietary elements. However, speaking from its perspective as an ILEC, Sprint does not believe that any of the elements proposed herein for inclusion in a mandatory baseline list is sufficiently "proprietary" to warrant a stricter test. And, based on Sprint's knowledge of other ILECs, it believes the same is true for other ILECs as well.

If the Commission believes that a definition of "proprietary" is really needed, Sprint would be inclined to favor a definition in terms of ILEC-specific intellectual property interests (as opposed to broadening the definition to include intellectual property of the ILECs' vendors). Thus, if the features and capabilities are defined by recognized industry standard-setting bodies or are widely available from vendors, they would not be considered "proprietary."

At the same time, however, the Commission should not create an incentive for ILECs to depart from established standards in minor respects simply to allow them to convert a non-proprietary element into a proprietary one for the purpose of thwarting their obligations under the Act. If and when the "proprietary" issue becomes important, the Commission will have to ensure that its definition of "proprietary" is not abused by ILECs seeking to shirk their statutory duty.

C. Interpretation of "Necessary"

In ¶16, the Commission asks for comment on the definition of "necessary" for the purpose of determining the proprietary elements that must be offered to requesting carriers. Sprint supports the definition set forth at p.15 of the AT&T White Paper:

> A proprietary unbundled network element is *necessary* for the purposes of §251(d)(2)(A) if requesting carriers do not have available, from the incumbent or others, a reasonable substitute for such proprietary element that enables an efficient competitor to provide a telecommunications service in an economically and functionally viable manner, taking into account the economic and functional characteristics of the proprietary element.

As will be discussed in more detail below, the Court evidently believes that the Commission must consider, in interpreting "necessary," external sources of supply, and Sprint believes that the above definition adequately does so.

D. Interpretation of "Impair"

Likewise, Sprint supports the definition of "impair" in AT&T's White Paper (id. at 15-16, bracketed language and footnote omitted):

> Requesting carriers' ability to offer a telecommunications service is *impaired* for the purposes of Section 251(d)(2)(B) if their inability to obtain a requested unbundled network element materially reduces their ability to offer the service. For purposes of this rule, the ways in which requesting carriers' inability to obtain an element may materially reduce their ability to offer a

> service include, but are not limited to, effects on the quality (including functionality), scope, or timeliness with which the service could be offered and the costs required to offer the service using a substitute functionality.

E. The Difference Between the "Necessary" and "Impair" Standards

In the Notice (¶¶18-19), the Commission seeks comment on whether the "necessary" standard only applies to proprietary network elements and the "impair" standard applies to "non-proprietary" network elements, and on the difference between the "necessary" and the "impair" standards. Although the statute is not free from ambiguity and there is no useful legislative history, it would appear that §251(d)(2), in its entirety, applies only to "proprietary" elements. Clearly, §251(d)(2)(A) on its face applies only to proprietary UNEs. It requires that the FCC consider whether "access to such network elements as are proprietary is necessary." The phrase "such network elements" refers here to those UNEs that are deemed to be "proprietary in nature." Section 251(d)(2)(B) requires that the Commission consider whether "the failure to provide access to such network elements would impair" the requesting carrier's ability to provide a service. In this provision, the phrase "such network elements" is most naturally construed to refer to the UNEs identified in §251(d)(2)(A) as proprietary and to which access would be denied under that provision. That is, it refers to those proprietary UNEs that are not deemed "necessary."

Furthermore, the terms "necessary" and "impair" lend themselves to constructions that are consistent with this view of §251(d)(2). A UNE that is deemed proprietary is "necessary" if no non-proprietary alternative can perform the same technical functions as the UNE originally requested. If no such alternative exists, the ILEC must provide the proprietary UNE. However, if access is denied because the UNE is not "necessary," §251(d)(2)(B) requires that the Commission consider whether reliance on an alternative would "impair" the requesting carrier's

ability to provide the telecommunications services it seeks to provide. Such impairment exists where the CLEC would experience a material increase in cost, delay or degradation in service quality.

This is the only construction that is consistent with the other provisions of the 1996 Act. For example, §251(c)(3) establishes the standard for ILEC provision of UNEs by imposing a broad duty to provide UNEs to "any requesting carrier." It would be strange indeed for Congress to establish this sweeping mandate and then include a slightly different standard for the provision of UNEs in a different subsection of §251. It is much more likely that Congress instead added §251(d)(2) to address the narrow question of how to deal with proprietary elements. Nevertheless, out of an abundance of caution, Sprint will assume for purposes of these comments that subparagraph 2(A) of subsection 251(d) applies only to proprietary UNEs and subparagraph 2(B) applies only to non-proprietary UNEs.

As for the second issue, there is no relevant legislative history of which Sprint is aware. But if the Commission decides that only subparagraph 2(A) applies to proprietary elements, then the fact that Congress chose to employ different words, together with the words that Congress chose to employ, suggest that the Congress had special concern for a requirement that ILECs would have to make available proprietary UNEs. Although as a practical matter the Commission may consider the same factors in determining the extent to which an element is "necessary" or its absence would "impair" the requesting carrier's ability to offer services, it is reasonable to construe the "impair" standard as somewhat easier to meet from the perspective of the requesting carrier. "Necessary" conveys a sense of sine qua non, while "impair" does not. Thus, a non-proprietary element could be required to be offered even if it were not "necessary" for the requesting carrier, so long as its absence would "impair" the requesting carrier's ability to offer

its intended services. However, because, as mentioned above, access to proprietary elements has not been a significant source of controversy thus far, it is not essential that the Commission, at this juncture, over-complicate this proceeding by fashioning a different and stricter test for "necessary" than for "impair."

F. Criteria for Determining "Necessary" and "Impair" Standards

1. Essential Facilities Doctrine

The "essential facilities" doctrine is an antitrust doctrine that is utilized to determine when a firm's conduct is so anticompetitive as to be a violation of the antitrust laws. The essential facilities doctrine holds that it is a violation of the antitrust laws for a firm to deny a competitor the use of a facility that the competitor cannot practically or reasonably duplicate and that is essential to the conduct of a business.[11] Nothing in the Supreme Court's decision in the Iowa case can be construed as requiring the Commission to import the essential facilities doctrine into its interpretation of "necessary" and "impair." On the contrary, the Court took note of the fact that some of the ILECs were arguing for such a proposition but did not buy their argument (119 S.Ct. at 734):

> We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply *that* standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind.

Instead, the Court held simply that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act…" (id.).

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[11] See e.g., MCI Communications v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.), cert denied, 464 U.S. 891, 104 S.Ct. 234 (1983).

Nor is there any indication that Congress intended to employ the essential facilities test. If Congress had simply wanted to rely on the essential facilities test, it could have dispensed with §251(c)(3) and (d)(2) altogether, and left the whole matter of unbundled network elements to the antitrust laws. But that is not what Congress did.

If the argument is that Congress meant for the Commission to employ the essential facilities test, that argument does not withstand analysis, either. Had that been the intent of Congress, it could have used "essential" in the definition of "network element" in §3(29), or it could have limited the ILECs' duty in §251(c)(3) to provide "access to essential network elements on an unbundled basis" and dispensed altogether with §251(d)(2). In short, the "essential" nature, vel non, of the facilities would have been dispositive. But instead, in §251(d)(2), it asked the Commission to "consider, at a minimum," whether access to proprietary elements is necessary and whether a failure to provide access would impair requesting carriers' provision of their services, thus clearly leaving the Commission with discretion to consider other factors that would warrant a requirement that ILECs furnish non-essential UNEs. Finally, if Congress had intended to impose an antitrust standard in §251 and allow the Commission to administer it, one would expect Congress to have reflected that fact in its antitrust savings clause (§601(b)(1) of the1996 Act).

It may well be an abuse of the Commission's discretion if it were to attempt to incorporate the essential facilities test in interpreting the "necessary" and "impair" clauses, for the very reason that §251(d)(2) clearly empowers the Commission to consider other factors that would warrant provision of UNEs in circumstances where they are not "necessary" or would not "impair" the of ability of requesting carriers to offer their services. Furthermore, using the essential facilities test here would conflict with the very fabric of § 251 of the Act. As noted

above, the essential facilities test is an antitrust doctrine generally intended to enable courts to adjudicate after the fact whether anticompetitive conduct constituting a civil violation of the antitrust laws has occurred thereby warranting the award of treble damages. As Judge Posner has observed, [12] the essential facilities doctrine is a qualification on the general rule that the antitrust laws do not impose a duty on firms with monopoly power to deal with their competitors. That antitrust milieu is far different than the pro-active framework of §251. In the latter case, Congress intended in fact to impose upon incumbent LECs ab initio a significantly detailed duty to deal with their competitors and thus placed broad affirmative obligations on incumbent local exchange carriers to cooperate with their competitors in a variety of ways, including interconnection (e.g., for purely facilities-based competitors), by making all of their services available on a resale basis and by offering components of their networks to competitors as UNEs. This broad duty was established as part of an elaborate, proactive effort to affirmatively correct the market failures (including the extensive presence of externalities) of the telecommunications industry.

The essential facilities doctrine, while used by the courts in a notoriously inconsistent manner,[13] has been criticized and limited in ways that simply do not apply here. The limitations surrounding the essential facilities doctrine stem largely from the limitations of the Sherman Act and the judicial process. Most importantly, the Sherman Act does not prohibit the charging of monopoly prices – in plain contradistinction to the Communications Act and specifically §§ 251 and 252. The prospect of mandating competitive access in the statutory context of the antitrust

[12] See Olympia Equipment Leasing Co., v. Western Union Telegraph Co., 797 F.2d 370, 376, reh. den. 802 F.2d 217 (7th Cir. 1986).

[13] See generally IIIA Areeda & Hovenkamp, Antitrust Law, ¶773 (1996). The inconsistency alone would counsel against looking to the doctrine as offering any readily useful or clear standard.

laws which allow for monopoly rents and market clearing prices can readily be (and has been) questioned,[14] but it has no bearing on the rate-regulated ILECs whose networks are unbundled under sections 251 and 252 and whose prices must be just and reasonable. Similarly, the antitrust doctrine has been criticized because the courts are ill-suited to monitor pricing and other access issues on a going-forward basis,[15] but this function is of course one of the Commission's primary statutory obligations.

2. Availability And Cost of Network Elements Outside The ILEC's Network

In ¶¶24-28 of the Notice, the Commission seeks comment on how to take into account, in giving context to the "necessary" and "impair" clauses, the availability of network elements from sources other than the ILEC, including self-provisioning. The AT&T White Paper enumerates (at 16-17) and explains (at 17-23) seven factors that Sprint believes should be considered in determining issues of necessity and impairment. However, Sprint would like to make several additional observations.

First, it is important to put the Court's decision in the proper context and not to exaggerate the fault that the Court found with the Local Competition Order. It would appear that the underlying flaw in the LCO, in the Court's view, concerned an interpretation of a provision that was not directly at issue before the Court, namely the Commission's determination that the duty under §251(c)(3) to allow a requesting carrier access to the ILEC network "at any technical feasible point" implies a duty on the ILEC's part to unbundle all network elements which it is technically feasible to provide. See 119 S.Ct. at 736. The Court held that this was wrong (id.):

[14] See P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 Antitrust Law Journal 841, 847 (1989) ("the legality of monopoly pricing has important implications for the essential facilities concept").

[15] See Areeda & Hovenkamp, supra, at ¶774e.

> The Commission's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding *any* "increased cost or decreased service quality" as establishing a "necessity" and an "impair[ment]" of the ability to "provide…services."

What is now before the Commission as a result of this error is simply to give "some substance" to the necessary and impaired clauses without "disregarding entirely" the availability of network elements from non-ILEC sources and by not regarding "any" increased cost or decreased service quality as establishing necessity or impairment. Indeed, the Court went on to observe (id.) that some of the Commission's analyses of various individual elements in the LCO may well suffice under whatever higher standard the Commission chooses to adopt on remand.

It is also useful to keep in mind the example the Court gave when it concluded that the Commission erred in finding that "any" increase in cost would impair the CLECs' the ability to offer their services (119 S.Ct. at 735, footnote omitted):

> An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not *ipso facto* been "impair[ed]…in its ability to provide the services it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary."

The Court went on to acknowledge (id.) that in a world of perfect competition with all carriers providing their services at marginal cost, the Commission's "any increase in cost" criterion might be reasonable. The fact that the Court illustrated its concern with the extreme example of a one percent differential in an obscenely high profit level strongly suggests that the Court did

not intend to imply that the Commission must impose standards that would make it difficult for carriers to obtain UNEs from ILECs. This is reinforced by the Court's response (119 S.Ct. at 735, n.11) to Justice Souter's dissent. The Court agreed with Justice Souter that chairs, milk cans and eight volumes of Gibbon are no substitutes for a ladder, when one is replacing a light bulb. Rather, the Court said that the proper analogy is between a ladder sufficiently tall to enable one to do the job, and a ladder one-half inch higher than that. Thus, the Court did not suggest that a particularly stringent test must be employed in giving content to the "necessary" and "impair" clauses.

In light of the Court's decision, the Commission cannot simply rest on its analysis in the LCO, and it is reasonable to assume that some notion of materiality must be involved. At the same time, the Commission need not raise the bar so high as to defeat the very purpose of §251(c)(3). That provision is designed to require ILECs to make UNEs available and thereby to facilitate local entry through one of three strategies contemplated by the Act.[16] Nothing in the Court's decision remotely suggests that the Commission is now obligated to apply the "necessary" and "impair" clauses in such a restrictive manner as to frustrate the procompetitive intent of §251(c)(3). Rather, as the Commission concluded in the LCO (id.), "our obligation…is to establish rules that will ensure that all procompetitive entry strategies may be explored."

The Court took issue with the Commission's statements in the LCO, that carriers would not request UNEs from ILECs unless other sources were more costly or less efficient, because "that judgment allows entrants, rather than the Commission, to determine whether access [to UNEs should be allowed]" (119 S.Ct. at 735). Yet it must be borne in mind that the statements

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[16] LCO, 11 FCC Rcd at 15509.

criticized by the Court were simply assumptions on the Commission's part, voiced – without citations to record evidence – in response to arguments of the RBOCs and GTE for regulatory regimes that would make access to UNEs much more cumbersome. See LCO, supra, at 15644.

Although Sprint does not question the Court's wisdom in faulting the Commission's unsupported assumptions, Sprint believes that the evidence of carrier behavior since the LCO was issued, shows that the Commission's assumptions were, in fact, reflective of real-world behavior. In his declaration (Appendix B hereto), Mr. Kevin Brauer, President-National Integrated Services and the executive responsible for Sprint's principal CLEC activities, explains that any carrier desiring a significant market presence over the long term must consider self-provisioning as the most desirable business strategy – indeed, the only strategy that can ensure that a carrier is the master of its own fate. He further explains that even where vigorous wholesale markets exist, reliance on carrier-competitors entails serious business risks in terms of possible pricing fluctuations, quality control, and changes in business strategy and/or control of the carrier-competitors from whom other goods and services are obtained. Thus, he concludes, the advantages of self-provisioning are so substantial that this is the strategy of choice, even when it is not the least expensive alternative for the near term.

Mr. Brauer further explains that business exigencies preclude exclusive reliance on self-provisioning. In some areas, the lack of customer density makes it likely that it will not be economic to completely self-provision. In other areas, it may eventually be economic to self-provision certain, but not all, elements. And even where self-provisioning is a feasible strategy in the long run, it may be necessary to enter the market first using facilities from others for a period of time, while building the customer base needed for economic self-provisioning.

Finally, Mr. Brauer explains that from the viewpoint of Sprint's long-run strategic self-interest, the RBOCs and other large ILECs are Sprint's least preferred source of external supply. These carriers are Sprint's principal competitors in the local market and, if or when the RBOCs satisfy the tests of §271, they will become significant competitors of Sprint in the long distance market as well. Sprint does not willingly put its fate in the hands of such significant competitors unless they are the only sources of supply, or unless the costs (in terms of both price and quality of service) of self-provisioning or using other carrier-competitors would have a significant and material negative impact on Sprint. The fact remains, however, that Sprint is compelled as a practical matter to turn first to these strategically least-preferred sources of supply, because of their ubiquity and economies of scale and, where alternatives for some network components exist, because of the difficulty of integrating elements from multiple suppliers. The very fact that Sprint turns to these strategic competitors for network elements is evidence that these ILEC-provided network elements are necessary to Sprint and that its inability to obtain them from the ILECs would materially impair its ability to offer its services.

In fact, there has been a significant movement to self-supply by CLECs since the LCO was issued three years ago. Sprint, for one, recently announced agreements to spend on the order of $1 billion to acquire three wireless cable providers in order to gain broadband access to 24.2 million households. Even with the self-provisioning capabilities that these acquisitions will eventually permit, Sprint will still need to rely on external sources of supply for local facilities in those cities. Sprint estimates that approximately 20% of homes cannot be served by wireless cable because of line-of-sight problems. In addition, the bandwidth available would not meet the needs of all customers: it is likely to suffice for residential customers and many small businesses that desire broadband communications capability, but will provide insufficient bandwidth for the

needs of larger businesses (and even some communications-intensive small businesses). Thus, in order to serve all segments of the market, Sprint will continue to require facilities from outside sources even in areas where it is acquiring self-provisioning capabilities.

Other carriers with major CLEC ambitions have greatly expanded their self-provisioning capabilities as well. Since the LCO was issued, AT&T purchased TCG (the largest CLEC) and TCI (in order to provide communications services over TCI's cable plant). And AT&T has recently announced plans to acquire MediaOne, another cable giant. The former WorldCom has purchased MFS, Brooks Fiber and MCI (including its MCImetro CLEC operations), and is in the process of acquiring a wireless cable company as well.

The fact that major CLECs are investing billions of dollars in self-provisioning capabilities substantiates Mr. Brauer's declaration that self-provisioning is the strategy of choice. But it is equally clear that no carrier can self-provision everywhere. The fact that these CLECs nonetheless continue to press for UNEs from the ILECs – their principal local competitors -- is strong evidence that these UNEs are of significant importance to their businesses and are not being sought simply out of laziness or convenience.

Even a major RBOC has concluded that CLECs must rely heavily on UNEs to succeed in local competition. SBC, in describing its out-of-region local entry plans in its "Narrative Response of SBC Communications Inc. to the FCC's 1/5/99 Request for Supplemental Information," filed February 2, 1999 in CC Docket No. 98-141, explained (at 26) that during the eleven-year period of its projected local entry plan, it assumed that 10% of residential service would be provided through total service resale ("TSR") and "assumed an initial mix of 80% unbundled network elements ('UNE') – that is, unbundled elements including more than just the loop – and 10% unbundled loops [presumably connected to SBC switches]" (emphasis added).

Even in the eleventh year of its entry plan, "70% of residential services would be provided via unbundled loops, 20% by UNE [i.e., the UNE platform], and 10% by TSR" (id.).

Furthermore, even if it were to happen that a major requesting carrier – e.g., Sprint, AT&T or MCI WorldCom – could entirely self-provision in a particular market area, the ILEC serving that area would still be required by §251(c)(3) to make unbundled elements available to other carriers. The fact that one carrier can self-provision does not imply that others can do so. And §251(c)(3) obligates ILECs to provide UNEs to "any" requesting carrier. The "necessary" and "impair" clauses must be read in that context. The statutory test is not whether the absence of an element would impair a $100 billion corporation or even a $10 billion corporation. Rather it is whether "the" carrier seeking elements would be impaired, and under §251(c)(3), that can be "any" carrier.

Likewise, the fact that another carrier has self-provisioned some or even all the elements needed for its service does not imply that this carrier could serve as an external source of supply for third carriers. Rather, the question is whether the owners of this non-ILEC plant are willing to make that plant available to requesting carriers and if, so, whether the requesting carrier can use those alternative sources without materially impairing its ability to offer the services it desires to provide. Unless and until a vigorous wholesale market develops for UNEs, then clearly the requesting carrier will be materially impaired if it is unable to obtain the elements it needs from the ILEC.

Moreover, a functioning wholesale market consists not only of willing suppliers, but willing buyers as well. There are a host of problems that a carrier can encounter in dealing with an alternative source of supply, many of which have been mentioned above, and some of which will be discussed, in more detail with specific reference to Sprint's experience, in Subsection H

below. Despite the aversion, discussed in Mr. Brauer's declaration, to being dependent on the dominant ILEC, there are serious downside risks in obtaining UNEs from other carriers. Such carriers are essentially unregulated and would be free to raise their prices at any time, subject to whatever contractual commitments they have made. Since there obviously are substantial nonrecurring costs involved in changing suppliers of any unbundled network element, a requesting carrier would have to consider the stability of alternative sources of supply. Alternative providers could change standards and quality of service, could change business strategies and even could exit the market, whether voluntarily or as a result of bankruptcy. Although the requesting carrier could protect itself to some extent through contractual provisions, a suit for damages for breach of contract, particularly against a potentially undercapitalized defendant, would be insufficient to protect the requesting carrier's long-run business interest in offering high quality service to its own customers.

Sprint does not believe that it is either possible or necessary for the Commission to define the "materiality" of impairment in quantitative terms (cf. ¶25 of the Notice). The impact of a difference in the cost of obtaining an element from an ILEC or an outside source will vary from one CLEC to another, depending on the services that CLEC offers and other aspects of its cost structure. And it is very difficult to quantify all the qualitative differences between obtaining an element from an ILEC and obtaining it from another supplier. Instead, the Commission can and should develop a baseline list of required UNEs by making legislative findings, based on the evidence in the record developed from this comment cycle, that the impracticality of plenary self-provisioning, the infancy of local competition, the lack of a functioning wholesale market, and the inherent reluctance of CLECs to have to rely on their primary competitors for facilities, compel the conclusion that at this time, local entrants would be materially impaired by the

inability to obtain UNEs (both those adopted in the LCO and the additional UNEs discussed below in Subsection H) from ILECs, and that access to these UNEs, to the extent they are proprietary, is necessary.

Sprint believes the Commission can fairly reach these conclusions on a nationwide basis without having to consider conditions on a geographically disaggregated basis at this time. And, by giving additional guidance to the states, through the definitions of "necessary" and "impair" discussed above, together with the relevant factors to be examined in determining whether those definitions have been met, the states will have the framework necessary to ensure that they could address requests for additional UNEs in particular arbitrations in a manner that comports with the Supreme Court's decision.

In ¶27, the Commission observes that one carrier's ability to compete may not be impaired if it is required to self-provision only one switch but that some entry strategies might require a new entrant to obtain multiple switches in order to compete effectively. The Commission then asks the extent to which factors such as economies of scale, penetration assumptions and the requesting carrier's particular market strategies should be considered as part of the necessary and impair analysis. This suggests that the Commission has in mind that the possibility that the necessary and impair provisions should be considered on a case-by-case basis for each requesting carrier.

Surely the Commission cannot intend to pass on each requesting carrier's business plan, telling one carrier that it should go out and buy its own switch, telling another that it can obtain unbundled switching capacity in three locations rather than the five the carrier desires, and perhaps even telling a third carrier to go out and build its own loop plant. The Commission lacks the staff, the expertise and the will to engage in such micromanagement. And since the

Commission's staff dwarfs the staffs of the state commissions, it cannot expect them to perform such a function for garden-variety network elements, either.

Sprint does not believe that the statute can fairly be interpreted to require or even allow such case-by-case consideration. Rather, §251(c)(3) imposes on ILECs the duty to provide, to "any" requesting telecommunications carrier, "nondiscriminatory" access to network elements. Thus, the ILEC cannot provide a particular network element to one requesting carrier but not another. Such a result would also be contrary to §252(i) of the Act and, as noted in Subsection A, above, the Court expected that the UNEs required after completion of these remand proceedings would be "unconditionally available" (119 S.Ct. at 736). Given this statutory framework, there is at the very least a strong presumption that network elements should be made available initially to all requesting carriers, and the burden should be on the ILEC to show that a particular carrier would not be impaired if it had to obtain the element from some alternative source (and the ILEC should have to provide the element to such carrier until its proves otherwise).

Finally, nothing in the Supreme Court's decision precludes the Commission, in giving content to the necessary and impair clauses, from considering non-price factors that can impact the requesting carrier's business (cf. ¶28 of the Notice). Indeed, throughout the Court's discussion of this issue (119 S.Ct. at 734-36), the Court treated a decrease in service quality co-equally with an increase in cost to the requesting carrier. See e.g., 119 S.Ct. at 736, where the Court stated that the Commission cannot regard any "increased cost or decreased service quality" as establishing necessity and impairment (emphasis supplied, internal quotation marks omitted). Thus, not only is the Commission free to consider qualitative as well as cost differences between elements obtained from an ILEC and other sources, but considering the business importance of

these factors it would be an abuse of discretion to refuse to consider qualitative differences as well.

G. Weight To Be Given To Various Factors

In ¶¶29 and 30 of the Notice, the Commission asks what weight it should attach to the necessary and impair clauses, what other factors the Commission should consider in addition to the necessary and impair tests in determining whether a particular network element should be unbundled, and how those additional criteria would interrelate with the necessary and impair clauses.

Both the statute and the Supreme Court's decision vested the Commission with broad discretion to consider other factors in favor of making a particular network element available. The fact that §251(d)(2) directs the Commission to consider the necessary and impair clauses "at a minimum" necessarily implies that the Commission may consider other factors as well. Nothing in the Court's decision limits the range of other factors the FCC can consider. On the contrary, the Court held (119 S.Ct. at 736) that in carrying out its duties under §251(d)(2) the Commission must "tak[e] into account the objectives of the Act" as well as giving "some" substance to the necessary and impair clauses. As long as the Commission gives due consideration to the necessary and impair clauses, it need not attempt to attach any specific weight to those requirements vis-à-vis other considerations it deems relevant. Sprint believes this is well established by the cases cited at n.35 of the Notice, and nothing in the Court's opinion suggests a contrary result.

As for what other factors should be considered, in general, Sprint believes that the Commission is free to consider any public interest factor consistent with the pro-competitive objectives of the Act that may warrant a requirement on ILECs to make UNEs available even

when they are not "necessary" or would not "impair" a requesting carrier's ability to offer a service. In this regard, Sprint submits that the "checklist" provisions of §271(c)(2)(B) – specifically items (iv)-(vii), (x) and (xii) – constitute a legislative conclusion by Congress that these elements must be made available on an unbundled basis. Thus, in the checklist, Congress not only requires non-discriminatory access to network elements in accordance with §251(c)(3) (and §252(d)(1)), but, in addition, specifically requires the RBOCs to make available unbundled loops; unbundled transport; unbundled local switching; access to 911/E911 services directory assistance (DA) and operator services (OS); as well as access to databases and signaling needed for call completion, and to information needed for local dialing parity. In short, Congress requires RBOCs to provide these elements even if the Commission were to find that they did not satisfy the "necessary" and "impair" tests of §251(d)(2). These obligations are imposed not only as preconditions to in-region long distance entry by the RBOCs, but also as continuing obligations on the RBOCs after they receive their initial entry authority. See §271(d)(6) (authorizing the Commission, inter alia, to revoke long distance authorization if an RBOC "has ceased to meet any of the conditions required for such approval…").

Central to the framework of §271 is the notion that RBOCs should not be permitted to enter the long distance market in-region until local competition has been fully enabled.[17] By specifically requiring the RBOCs to make available, on an unbundled basis, the various network elements enumerated in the checklist, it is clear that Congress viewed these elements as essential to creating a market in which local competition could function, quite apart from however the Commission may otherwise have chosen to implement §251(c)(3). Congress obviously

[17] Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, 20602 (1998).

differentiated between RBOCs and other ILECs. However, in view of the fact that opening up the local market generally (at least for non-rural ILECs[18]) – and not just local markets served by RBOCs – was the very purpose of §251 of the Act (id.), the network elements deemed essential by Congress for the development of local competition in RBOC territories should be available from all ILECs, at least during the period when local competition is in its infancy.

H. Application of Criteria To Previously Identified and Other Network Elements

In this Section of the NPRM, the Commission requests parties to apply their proposed standards and criteria to the network elements previously identified in the LCO and to any other network elements they contend should be unbundled. Attached as Appendix C are Sprint's proposed amendments to the Rules.

1. Elements Previously Required By §51.319 Of The Rules

With the possible exception of directory assistance[19] and operator services, all of the elements previously required in the LCO satisfy the "necessary" and "impair" criteria set forth above (Subsections C, D and F.2). And directory assistance and operator services should be retained as required elements in any event, because they are checklist items in §271 (see Subsection G above). The AT&T White Paper (at 34-54) contains an extensive discussion of how the "necessary" and "impair" criteria bear on these elements. Rather than burden the record with repetitive argument, Sprint will instead confine its comments to supplementing AT&T's analysis in a few respects.

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[18] See §251(f).

[19] But not DA databases. See AT&T White Paper at 52-54.

Loop Elements. Sprint wholeheartedly concurs with the Commission's "strong expectation" (Notice, ¶32) that loops will meet any reasonable interpretation of the necessary and impair tests. There is simply no ubiquitous alternative source of loop plant today. Although, as discussed in Subsection F.2 above, some CLECs are making attempts at partial self-provisioning, no carrier can replicate the entire local network. Thus, even these CLECs have a continuing need to obtain the loop element from the ILECs to serve customers that are beyond their own areas of build-out. Sprint is not aware of any general wholesale offering of loop plant. Rather, those who own it naturally want to use it themselves. Sprint also agrees with the Commission (id.) that nothing in either the statute or the Supreme Court's decision would preclude the Commission from requiring, as it did in the LCO, to provide conditioned, xDSL-capable loops.

Local Switching. Unless a carrier happens to have its own loop plant, it is generally much more economical for the carrier to connect unbundled loops purchased from an ILEC to that ILEC's local switches than to attempt to provide its own switch. SBC, for one, concludes as much. See Subsection F., above. There are significant economies of scale in local switching that make it difficult for new entrants to self-provide until they have amassed a significant customer base. For example, if a CLEC deployed a large switch, e.g. with a potential capability to handle 100,000 access lines, in a large market, but initially served only 1000 access lines, Sprint estimates that the unit cost per line would amount to roughly $66 per month, whereas the ILEC, purchasing the same switch at the same cost,[20] but serving 50,000 access lines, would have a unit cost of about $4.55 per month. If, instead, the CLEC deployed a smaller switch with a capacity of roughly 10,000 lines (but which obviously has more limited growth capabilities), its monthly

[20] This may be a conservative assumption, since it is widely believed that switch vendors give substantial discounts to large ILECs.

cost per line would still be $27, or nearly six times the ILEC's cost. Obviously, it would be cost-prohibitive in either case for the CLEC to self-provision. Rather, it makes more sense to purchase switching as a UNE (a typical charge for which is between $5.00 and $6.50 per month per access line), unless or until the CLEC can grow its customer base to the point that it would be economic to employ its own switch.

Furthermore, even where the CLEC has deployed its own switch, there are difficulties in connecting the switch to ILEC loops, particularly (as is generally the case today) where the CLEC switch is not collocated in the ILEC's central office. Sprint has had first-hand experience with these difficulties in Florida, where it deployed its own CLEC switch and connected it to UNE loops from the ILEC. As explained in more detail in Appendix D, extending the loops from the ILEC central office to the CLEC's switch location necessarily requires longer, more costly and less-efficient cross-connects,[21] and introduces more failure points within the network. Other difficulties Sprint has experienced include coordination problems, testing problems, system inconsistencies, circuit and equipment nomenclature differences, and general incompatibility between Sprint's network and the ILEC's network which necessitates conversions and accommodations that ultimately degrade service. Furthermore, from a trouble isolation and resolution standpoint, the "two network" approach introduces inefficiencies that hamper Sprint's ability to deliver service at the same level of quality of a competing end-to-end ILEC-provisioned service.

Where it is uneconomic for a carrier to self-provision its switches, it may have no choice but to use the ILEC's switch. Although a number of CLECs have deployed their own switches,

[21] The longer loop length assumes all the more importance where broadband services using copper loops are involved, since xDSL technology depends on loop lengths of 18,000 feet or less.

Sprint is unaware of any CLECs that offer their switching capabilities today on a wholesale basis. On the contrary, there are indications that where CLECs possess their own switching plant (or their own loops or loops obtained from ILECs as UNEs), they do not offer that plant on reasonable terms. For example, a growing number of CLECs are attempting to exploit their local switching/loop bottlenecks with respect to the end users they serve by charging access charges that are as much as twelve times the rate charged by the ILEC in the same geographic region.[22]

In any event, even if CLECs began to offer local switching on a wholesale basis, there are a number of problems involved in piecing together loops from the ILEC and switching from another CLEC. In 1997, as also described more fully in Appendix D, Sprint conducted a technical trial using loops provided by an ILEC and a local switch deployed by an unaffiliated CLEC in New York. Numerous problems ensued. It was difficult for Sprint to coordinate between the two element providers. When technical problems arose, there were several instances where each LEC claimed that the trouble was on the other LEC's network. Out of seven lines connected to the switch, four were misconnected and the other three had no dial tone! Although this experiment never went beyond a technical test, the CLEC providing the switch made clear that if Sprint were to offer commercial service over this arrangement, the CLEC would insist that it be considered the provider of access service to/from the end user, thus depriving Sprint of a significant revenue source it would have if it obtained local switching as a UNE from the ILEC.

Dedicated Transport. Competitive providers of dedicated transport have been in the market for a decade now. Although they were initially limited to offering end-to-end services,[23]

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[22] See Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for Declaratory Ruling filed October 23, 1998 by AT&T.

[23] E.g., local private lines and direct connections between IXCs and their customers.

the Commission's Expanded Interconnection decisions[24] and similar actions by some state commissions allowed these carriers to collocate in ILEC central offices for special access and local transport of switched access traffic. Sprint believes its experience with alternative suppliers of switched transport and special access, albeit in the context of long distance rather than local traffic,[25] demonstrates the continued need for dedicated transport to be available as an unbundled element from ILECs.

This experience is explained in more detail in the attached declaration of Robert W. Runke, Vice President-Network Distribution, appended as Appendix E. Mr. Runke is responsible for ordering interstate and intrastate access services for Sprint's long distance unit. As he explains, given its desire, wherever feasible, to reduce its dependence on ILECs as sole suppliers of access facilities, Sprint's long distance unit made several attempts to utilize competitive access providers ("CAPs"). Ultimately, Sprint made significant use of CAPs, and designated CAPs as Sprint's preferred provider of special access in five metropolitan areas: New York, Denver, Charlotte, Miami and Fort Lauderdale. In New York, the CAP was also designated as Sprint's preferred provider of dedicated switched transport. However, in all but New York, the CAPs were not collocated in enough ILEC offices to make it practical to use them for any dedicated switched transport. Even in New York, which is, because of its customer and traffic density, perhaps the most conducive LATA in the country to the development of transport competition, Sprint, out of necessity, continued to use the ILEC extensively for

[24] Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (Report and Order) (1992), 8 FCC Rcd 7374 (Second Report and Order) (1993) (subsequent history omitted).

[25] In its Third Order on Reconsideration and Further Notice of Proposed Rulemaking herein, 12 FCC Rcd. 12460, 12496 (1997) the Commission invited comment on whether IXCs could purchase transport UNEs as a substitute for access transport, where the IXC is not also the customer's local carrier. That issue is still pending.

switched transport because the CLEC was not collocated in all ILEC offices and hence could not offer a ubiquitous alternative, even in this high-density LATA.

In addition to this lack of ubiquity, Sprint has encountered other problems in dealing with CAPs. In presenting these difficulties, Sprint does not wish in any way to denigrate the suppliers Sprint has used. Rather this experience illustrates, in a relevant market where competition has been available for many years now, the practical problems faced in utilizing alternatives to the ILECs. As discussed in Mr. Runke's declaration, Sprint has had issues with the basic design and architecture of the plant of competitive access vendors. To Sprint, it is critical that its access architecture be highly reliable. Although many CAPs utilize some form of SONET technology, not all can meet Sprint's desire for four-fiber, bi-directional line-switched SONET rings which permit a full protect backup for each working fiber so that 100% of the traffic can be handled in the event of a fiber cut or other failure. In both Miami and Kansas City, Sprint suffered significant network outages as a result of the CAP's use of aerial fiber.

Attempting to utilize competitive access vendors for its special access needs, which includes both interoffice transport and loop facilities, is also illustrative of the difficulties of combining elements from different sources of supply. In these cases, Sprint uses the alternative vendor as far into the ILEC network as it has facilities, but then the alternative vendor must turn to the ILEC for the terminating loop and, in some cases, interoffice transmission. In these cases, the customer notification process is complicated, unscheduled site visits are often required and the ability of the access vendor to meet the requested installation date is reduced. Nationwide, ILECs meet initial installation due dates almost 90% of the time while installation dates were met only 46-68% of the time for the principal alternative vendors on which Sprint has relied. Where facilities of more than one carrier are involved, repair times are longer. The repair time

when the facility was part ILEC and part CAP is nearly three times as long as when the facility is entirely on the network of the CAP. Furthermore, Sprint has run into customer perception problems in its attempt to use alternative vendors for special access. Even where a choice of vendors is possible all the way to a customer premises, only 43% of Sprint's DS3 dedicated access customers have chosen the alternative vendor, even though they would save often up to 20% by doing so.

Furthermore, with the acquisition of two major competitive access vendors – TCG and MFS – by Sprint's principal long distance competitors – AT&T and MCI/WorldCom – Sprint has a considerable reluctance simply to shift its access dependence from potential long-distance competitors – the RBOCs – to its major long distance competitors at present. With their ubiquity and quality-of-service advantages, once again the balance is decidedly in the ILECs' favor.

2. Additional Elements

In light of the experience gained in the three years since the LCO, and particularly with the growing importance of broadband local capabilities, the Commission should refine its prior definitions of UNEs and expand the baseline list of required UNEs to ensure that requesting carriers have access to the network elements needed to enable them to provide competitive broadband local services (cf. Notice, ¶35). As the Commission noted in ¶32, the LCO required ILECs to offer DSL-capable loops. At that time, ILECs had not yet begun offering xDSL services as such, but that is no longer the case. Thus it is necessary to require the ILECs to offer the additional capabilities they now have in their networks. If competition is going to succeed, then as technology changes and services begin to migrate to the new technology, competing carriers must have access to UNEs reflecting this new technology. Otherwise, the avenue of UNE-based local competition would soon become a dead-end street.

Sprint discussed these needs at length in its September 25, 1998 Comments and October 16, 1998 Reply Comments in CC Docket No. 98-147. There, Sprint identified a number of additional elements beyond xDSL-capable loops needed for advanced services capability:

- xDSL-equipped loops
- Subloop elements (including the path from the customer premises to an optical network unit ("ONU") or remote terminal, and the path from the ONU or remote terminal to the central office)
- DSLAMs (digital subscriber line access muliplexers)
- xDSL line cards when the ILEC deploys "next generation" digital loop carrier ("NDLC")
- Packet-switching

All of these elements are well within the definition of 'network element" in §3(29) of the Act, and nothing in the Court's decision in any way impinges on the Commission's ability to determine what constitutes a "network element." The advanced-services-related loop elements, like any other loops, remain the bottleneck of all bottlenecks. And even though it may be possible for some carriers in some instances to provide advanced services through collocation of their own DSLAMs connected to DSL-capable loops, the fixed costs of collocation are such that this will not be an economic way for requesting carriers to provide advanced services to consumers in the portions of the market where they do not expect substantial customer density.

Sprint is in the midst of requesting collocation in more than 1,000 ILEC end offices so that it can install its own DSLAM equipment and provide its Sprint ION service through DSLAMs and xDSL-capable loops to small businesses and residential customers.[26] It selected these end offices on the belief that it could achieve a sufficient market penetration of customers

[26] A explained above, Sprint anticipates using wireless cable for ION service, but even where it owns such facilities, it may need to supplement them with xDSL facilities where line-of-sight problems are present.

served by these end offices to justify the high fixed costs of collocation. Based on Sprint's experience thus far, the average non-recurring charges for a 100 square foot cage quoted by the RBOCs range from $26,000 (Ameritech) to $92,000 (Southwestern Bell), while quotes for individual sites range up to $358,000 (Pacific Bell) . Obviously, other entrants lacking Sprint's substantial service capabilities and brand name recognition might not attract nearly as large a customer base in these areas and thus would not be able to justify the high cost of collocation in anywhere near as large a number of end offices. Moreover, the end offices Sprint has targeted for collocation are less than one-tenth the total number of end offices in the U.S. In order for Sprint to offer its Sprint ION services to the rest of the country, it will be largely dependent on its ability to obtain DSL-equipped loops as UNEs (or loop subelements) from ILECs in areas where ILECs have the necessary plant.

Even in the offices where Sprint is collocated, Sprint will not be able to serve all customers merely by purchasing xDSL-capable loops from ILECs. Some customers may have loop lengths that are simply too long. Others may have loops provisioned through fiber-to-the-curb technology or digital line concentrators ("DLCs") at remote terminals, in which case it may not be possible to condition the loop to be xDSL-capable. ILECs are increasingly deploying DLCs in their networks. Sprint estimates that between copper loops that exceed usable length limitations and customers served via DLCs, only 55% of access lines are xDSL-capable today, and expects that number to decline to 45% by 2001. Moreover, the increased deployment of DLCs often occurs in new subdivisions that often house the consumers that are most likely to desire broadband communications capability.

In cases where the ILEC itself is able to offer xDSL services to such customers, it is necessary for CLECs to have access to xDSL-equipped loops. In such cases, the requesting

carrier should be allowed to obtain DSLAM functionality through a dedicated, rather than shared, DSLAM. A garden-variety xDSL-equipped loop, for example, is connected to a common DSLAM in the ILEC central office, thus requiring the ILEC to send the data from the particular end user through a packet switch (that often is not located in that central office) before it can be delivered to the requesting carrier. If the requesting carrier had sufficient customer density, it may be more efficient for both parties to utilize a DSLAM that is dedicated to a particular CLEC, to avoid unnecessary switching and transport (from the ILEC's serving wire center to the location of its packet switch) on the part of the ILEC and to obviate the need for – and expense of – collocation.

Even xDSL-equipped loops may not fully meet the needs of competing carriers for access to ILEC loop plant. There are a number of varieties of DSL services, and if the version offered by the ILEC on a retail basis does not fully meet the requesting carrier's needs, the requesting carrier should have the right to utilize the loop plant in different ways from the ILEC. In next-generation DLCs, many of these difficulties might be solved by allowing the requesting carrier to specify the use of a line card in the DLC that is compatible with the service the requesting carrier intends to provide. There is no technological reason why these capabilities could not be available by mid-2001. But where older-generation DLCs that lack these capabilities are employed (and DSL-capable loops are not available), the requesting carrier should have access to sub-loop elements so that it can collocate its own DSLAM adjacent to the ILEC's DLC (or ONU).

There is also need for access to ILEC packet switching and packet transport. In cases where the requesting carrier is purchasing DSL-equipped loops from the ILEC, and hence using the ILEC's DSLAM equipment, there may be no practical way of obtaining the traffic carried

over that loop from the ILEC without it first going through the ILEC's packet switch. In other words, the packet switch might be the first feasible point of interconnection for a DSL-equipped loop.

With respect to transport, the original §51.319 did not enumerate all the forms of transport that must be offered as UNEs, but the LCO made clear (11 FCC Rcd at 15718) that all transmission capabilities must be made available. The Commission should reiterate that obligation and make clear that any transmission capability offered by the ILEC, including both capacity-related (e.g., DS1, DS3, Optical Carrier levels) and quality-related (e.g., redundancy and self-healing capabilities) be available as UNEs. The fact, discussed above, that there is no ubiquitous alternative to the ILECs for transport warrants a finding that the absence of transport as a UNE would materially impair other carriers' services. Manifestly, if a requesting carrier is competing with an ILEC for high-capacity, high-quality services, ILECs cannot deny such elements to the requesting carrier without violating the nondiscrimination duty imposed by §251(c)(3). A bunch of DS-1s, for example, are no substitute for a self-healing OC-12.

Finally, a critical requirement, in order for CLECs to be able to provide UNE-based advanced services, is that they have access to ILEC databases (at such time as those databases come into being) that show which loops qualify as xDSL-capable (e.g. loop lengths, whether DLCs or ONUs are present, etc.). Without parity of access to such databases, CLECs would be unable to respond promptly and accurately to customer queries about the availability of services, and would have difficulty in making sound economic decisions whether the addressable market is large enough to justify the costs of collocation. The OSS provisions of §51.319, as adopted in the LCO, are sufficiently broad as to encompass these needs, and therefore Sprint has not

proposed any broadband-related changes to those provisions. Nevertheless, this issue is too important to have left unmentioned.

3. Other Issues

In ¶33, the Commission also asked for comment on whether it can require ILECs to combine unbundled elements that they do not already combine in their network. The Supreme Court's decision reinstated §51.315(b) of the Rules, which forbids ILECs to separate already-combined elements before providing them to a competitor. Whatever else the Commission does, it should clarify that rule to make clear that if an ILEC, on its own initiative, combines particular elements in one location or for one particular retail customer, it should be expected to combine those same elements for other customers in the same central office or indeed anywhere else in its operating area (absent a showing of technical infeasibility with respect to a particular customer or a particular end office).

The next step – whether ILECs can be required to combine elements that they do not combine (or have never combined) in their network – is an issue that was not addressed by the Court. The Eighth Circuit had vacated this provision of the rules, and as the Commission points out (n.41), the Commission has sought a voluntary remand of this portion of §51.315 in a motion that is still pending before the Eighth Circuit. Assuming the Eighth Circuit grants the Commission such a remand, then consistent with the procompetitive purposes of §251, Sprint believes that it is reasonable for the Commission to use its broad rulemaking authority to impose a requirement that the ILECs combine uncombined elements when requested to do so by CLECs. Speaking from its ILEC perspective, Sprint would rather combine elements on behalf of a CLEC (subject, of course, to technical feasibility and safety considerations) than to have to open its offices to CLEC technicians. However, if the Commission does not impose this duty on ILECs,

then CLECs need to be able to create such combinations for themselves without incurring unnecessary costs, e.g., by using electronic methods rather than physical arrangements and rather than requiring collocation. Likewise, if CLECs need access to ILEC central offices in order to effectuate such combinations, because the ILECs have refused to do the work themselves, the CLECs must be allowed access subject to reasonable security measures and without any charge (except a charge for the reasonable security measures that may be required), on the CLEC.

I. Modifications to Unbundling Requirements

In ¶¶37-40 the Commission asks for comment on a series of questions relating to how it should allow for the removal of an unbundled element from the mandatory list at a future date. Sprint can understand the Commission's desire to address comprehensively all questions relating to unbundled network elements in a single proceeding. However, these questions are simply premature at this time, and consideration of them will unnecessarily complicate, and thereby delay, the issuance of a final order. Action is urgently needed to reinstate §51.319 of the Rules in order to remove the opportunity for obfuscation, delay and gamesmanship that some large LECs are employing because of the Supreme Court's vacatur of §51.319.[27] It is far too early in the process of local competition for the Commission to even begin to arrive at suitable trigger points or metrics that would automatically warrant removing a particular UNE from the mandatory list. It is not until local competition takes hold and a wholesale market develops for UNEs from alternative suppliers that the Commission should start to devote its scarce resources to addressing such issues. In this regard, Sprint must observe that a number of issues raised in petitions for reconsideration of the LCO nearly three years ago remain pending before the

[27] See text accompanying n.1, supra.

Commission. Similarly, the Commission has not yet acted on the issue raised nearly two years ago in its Further Notice of Proposed Rulemaking and Third Reconsideration Order in this docket.

The first order of business ought to be for the Commission to complete the task of establishing a framework in which local competition can truly begin before it decides how and when various pieces of that framework might be subject to alteration or removal. In addition, the Commission will have an opportunity, in the course of the mandated biennial review of its rules, to consider whether changes in marketplace conditions warrant revision of §51.319. Furthermore, as is the case with any rule, a particular ILEC always has the right to seek a waiver if it can show exceptional circumstances that justify such action.

At the same time, given the RBOCs' history,[28] if the Commission gives any encouragement at all to the waiver option, it is likely to be inundated with such requests. Thus, Sprint believes it would be prudent for the Commission to establish a "quiet period" of, e.g., five years, during which it would look with disfavor on any waiver requests and would require the strongest possible showing before granting such relief.[29] Such a quiet period is essential if the Commission expects CLECs to be able to use the UNE approach to local market entry. CLECs cannot be expected to formulate business plans for UNE-based entry without some assurance of stability in the regulatory environment. Unless they know that the baseline list of UNEs is going to be available for a reasonable period, they will be deterred from committing the capital and

[28] It may be recalled that some of the RBOCs began making noises about removing the interLATA restriction from the MFJ the very week that it became effective.

[29] The Commission recently adopted a similar approach in its Third Report and Order in CC Docket No. 96-128 (FCC 99-7, released February 4, 1999), in which the Commission (¶18) expressed its anticipation that the rate set in that order would remain applicable for at least three years and stated that it would look with disfavor on any request to modify either the rate or the compensation mechanism before then.

other resources needed to enter the market through the use of UNEs. As the end of this quiet period approaches, the Commission could commence an inquiry into whether and how to modify the baseline list of required elements.

It may also be noted that the Commission's present interest in seeking a mechanism for removing UNEs from the mandatory list may be purely academic if and when the time comes that the removal of any UNEs from §51.319 would no longer impair the ability of CLECs to offer their desired services. As indicated above, Sprint does not believe the Commission would be able to make the findings necessary to remove an element from the mandatory list unless or until a vigorous wholesale market develops. And if such a market does develop, the ILECs may have compelling business reasons to continue to want to offer to provide UNEs whether they are compelled to or not. The fact that the §251(c)(3) obligation to provide UNEs carries with it the obligation to price them on the basis of TELRIC would not be a reason for the ILEC to desire to be relieved of the obligation under such a scenario. If a vigorous wholesale market develops at a time when an ILEC is constrained to offer UNEs at TELRIC-based prices, that means that the competitive suppliers are offering these elements at comparable or perhaps even lower rates, and thus it would be equally academic for the ILEC to be relieved of the requirement to price at TELRIC: market discipline would force it to continue to do so.

In any event, if the Commission is inclined to consider removal mechanisms now, Sprint offers a few general observations. First, in response to the questions raised in ¶38, Sprint does not believe the Commission can or should delegate to the states the responsibility for deciding when network elements should be removed from the national mandatory list. It is one thing for the Commission to allow the states to require the unbundling of additional elements beyond the mandatory list, in the context of arbitrating an interconnection dispute between particular parties.

However, it would defeat the very purpose of national standards if the Commission were to allow states to derogate from those standards. This is not to say that the states' views should not be considered in determining when marketplace conditions have evolved to the point that there is a competitive wholesale market for a particular unbundled network element. Such a development is likely to occur, if at all, at different times in different parts of the country and indeed in different portions of each state. By their very nature, the state commissions are likely to be closer to and far more knowledgeable about competitive conditions in localized areas than this Commission, and this Commission should draw upon the states' knowledge and expertise in evaluating waivers or other requests (e.g., rule amendments, etc.) to remove elements from the list. However, the ultimate decision to change the national rules must reside with the national regulatory authority. Otherwise, the very purpose of empowering the Commission to issue rules governing interconnection under §251 would be negated, and the Commission would be fostering a regulatory environment that is "surpassing strange."[30]

Sprint also opposes the notion that the Commission could simply allow §51.319 to "sunset" either upon the passage of time or the occurrence of certain events (Notice, ¶39). Necessarily, the Commission cannot determine whether requesting carriers would not be impaired by the removal of an element from the §51.319 list without consideration of the facts and circumstances at that time. Sprint is aware of no crystal ball that would allow the Commission today to make such judgments about future facts and events. In view of the nascent state of local competition today, nothing that has happened since the LCO was issued could

[30] AT&T v. Iowa Utilities Board, supra, 119 S.Ct. at 730 (n.6).

rationally give the Commission the degree of optimism about the success of local competition that would warrant consideration of removing elements from the baseline list.

In any event, if the Commission does develop mechanisms for taking elements off the mandatory list, it should also have in place a mechanism to place them back on the list if conditions should reverse themselves and such actions should be warranted.

J. Additional Questions[31]

In ¶43 the Commission requests comment on the extent to which the availability of resold services obtained from the ILEC should be considered in determining whether a network element should be unbundled. As the Commission notes, the LCO explicitly rejected the argument that ILECs should not have to unbundle elements if those elements are equivalent to services available for resale. The Court affirmed this aspect of the LCO (119 S.Ct. at 734), and there is no need or occasion to revisit this issue.

Finally, there is clearly no "legal or policy basis for concluding that the inability to obtain access to combinations of network elements could impair a requesting carrier's ability to provide service to residential customers, but not business customers" (Notice ¶43). The impairment clause issue relates solely to which elements must be made available, and is separate and distinct from whether ILECs must combine the individual elements, as is required by §51.315(b). The Court upheld §51.315(b) on the strength of the Commission's argument that such a rule is needed to prevent ILECs from disconnecting elements, not for any productive reason, but just to impose wasteful reconnection costs on new entrants. 119 S.Ct. at 737. The Commission's

[31] Sprint has already addressed the questions raised in ¶¶41 and 42 about the interrelationship between the competitive checklist §271 and the mandatory unbundling of elements pursuant to §251(c)(3) and (d)(2), as well as the importance of a competitive wholesale market for a network elements in determining whether a requesting carrier would be impaired by the absence of an element from the ILEC.

rationale applies equally to all services a requesting carrier intends to offer. It would be irrational to allow an ILEC to impose "wasteful" costs on a CLEC that wishes to provide service to business customers, while precluding the ILEC from imposing such costs when the CLEC wishes to provide service to residential customers. Such a rule would also fly in the face of the broad parameters of §251(c)(3), which impose on ILECs the duty to provide UNEs to "any" requesting telecommunications carrier for the provision of "a" telecommunications service, on a "nondiscriminatory" basis. It would be the height of discrimination to restrict the ability to order UNEs efficiently only when they are to be used to provide service to a particular customer group. This would be the classic sort of output restriction that the Commission has looked upon with disfavor for the past two decades.[32]

Moreover, there is in any event no rational basis for distinguishing between "residential" and "business" customers. Many residential customers make more intensive use of communications than small businesses, and indeed the expanding capabilities offered by the communications industry are facilitating greater use of "work at home" options in many companies. In this respect, the dividing line between "residential" and "business" is less than clear today and is likely to be even fuzzier in the future. Attempts to impose such a rule would create difficult problems of definition, enforcement and abuse. But most fundamentally, it would seek to sanction the very nondiscrimination that the terms of the Act prohibit. The Commission should recall that it ruled in the LCO (11 FCC Rcd at 15612) that the "nondiscriminatory" standard in §251 is more stringent than the "unjust and unreasonable discrimination" standard used in the 1934 Act.

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[32] See, e.g. Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), recon., 62 FCC 2d 588 (1977), aff'd, AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978).

III. CONCLUSION

The Commission should devote its highest priority to restoring §51.319 to the books. After due consideration of the necessary and impair clauses and other relevant public interest factors, it should adopt a list of required unbundled elements as discussed above.

Respectfully submitted,

SPRINT CORPORATION

/s/ Richard Juhnke
Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
1850 M Street, N.W., 11th Floor
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May 26, 1999

Connie Nicholas
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May 6, 1999

Andrew M. Jones
Sprint
8140 Ward Parkway
Kansas City, MO. 64114

Dear Mr. Jones:

GTE has received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, Sprint Communications Company, L.P. (Sprint) elects to adopt the terms of the arbitrated Interconnection Agreement between AT&T Communications of the Pacific Northwest, Inc. (AT&T) and GTE that was approved by the Commission as an effective agreement in the State of Washington in Docket No. UT-960307 (Terms)[33]. I understand you have a copy of the Terms.

Please be advised that GTE's position regarding the adoption of the Terms is as follows. Sprint does not necessarily concur with GTE's position.

On January 25, 1999, the Supreme Court of the United States ("Court") issued its decision on the appeals of the Eighth Circuit's decision in *Iowa Utilities Board.* Specifically, the Supreme Court vacated Rule 51.319 of the FCC's First Report and Order, FCC 96-325, 61 Fed. Reg. 45476 (1996) and modified several of the FCC's and the Eighth Circuit's rulings regarding unbundled network elements and pricing requirements under the Act. *AT&T Corp. v. Iowa Utilities Board,* No. 97-826, 1999 U.S. LEXIS 903 (1999).

Three aspects of the Court's decision are worth noting. First, the Court upheld on statutory grounds the FCC's jurisdiction to establish rules implementing the pricing provisions of the Act. The Court, though, did not address the substantive validity of the FCC's pricing rules. This issue will be decided by the

[33] I "These "agreements" are not agreements in the generally accepted understanding of that term. GTE was required to accept these agreements, which were required to reflect the then-effective FCC rules.

Eighth Circuit on remand.

Second, the Court held that the FCC, in requiring ILECs to make available all UNEs, had failed to implement section 251 (d)(2) of the Act, which requires the FCC to apply a "necessary" or "impair" standard in determining the network elements ILECs must unbundle. The Court ruled that the FCC had improperly failed to consider the availability of alternatives outside the ILEC's network and had improperly assumed that a mere increase in cost or decrease in quality would suffice to require that the ILEC provide the UNE. The Court therefore vacated in its entirety the FCC rule setting forth the UNEs that the ILEC is to provide. The FCC must now promulgate new UNE rules that comply with the Act. As a result, any provisions in the Terms requiring GTE to provide UNEs are nullified.

Third, the Court upheld the FCC rule forbidding ILECs from separating elements that are already combined (Rule 315(b)), but explained that its remand of Rule 319 "may render the incumbents' concern on [sham unbundling] academic." In other words, the Court recognized that ILEC concerns over UNE platforms could be mooted if ILECs are not required to provide all network elements: "If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network."

The Terms which Sprint seeks to adopt does *not* reflect the Court's decision, and any provision in the Terms that is inconsistent with the decision is nullified.

GTE anticipates that after the FCC issues new final rules on UNEs, this matter may be resolved. In the interim, GTE would prefer not to engage in the arduous task of reforming agreements to properly reflect the current status of the law and then to repeat the same process later after the new FCC rules are in place. Without waiving any rights, GTE proposes that the parties agree to hold off amending (or incorporating the impact of the decision into) the Terms and let the section 252(i) adoption proceed by maintaining the status quo until final new FCC rules are implemented (the "New Rules"), subject to the following package of interdependent terms:

1. GTE will continue to provide all UNEs called for under the Terms until the FCC issues the New Rules even though it is not legally obligated to do so.

2. Likewise, Sprint agrees not to seek UNE "platforms", or "already bundled" combinations of UN Es.

3. If the FCC does not issue New Rules prior to the expiration of the initial term of

the Terms, GTE will agree to extend any new interconnection arrangement between the parties to the terms of this proposal until the FCC issues its New Rules.

4. By making this proposal (and by agreeing to any settlement or contract modifications that reflect this proposal), GTE does not waive any of its rights, including its rights to seek recovery of its actual costs and a sufficient, explicit universal service fund. Nor does GTE waive its position that, under the Court's decision, it is not required to provide UNEs unconditionally. Moreover, GTE does not agree that the UNE rates set forth in any agreement are just and reasonable and in accordance with the requirements of sections 251 and 252 of Title 47 of the United States Code.

5. The provisions of the contract that might be interpreted to require reciprocal compensation or payment as local traffic from GTE to the CLEC for the delivery of traffic to the Internet are not available for adoption and are not a part of the 252(i) agreement pursuant to FCC Rule 809 and paragraphsl3ll and 1318 of the First Report and Order.

GTE believes that the first four conditions above are adequately explained by the first part of this letter. The reason for the last condition is the FCC gave the ILECs the ability to except 252(i) adoptions in those instances where the cost of providing the service to the requesting carrier is higher than that incurred to serve the initial carrier or there is a technical incompatibility issue. The issue of reciprocal compensation for traffic destined for the Internet falls within FCC Rule 809. GTE never intended for Internet traffic passing through a CLEC to be included within the definition of local traffic and the corresponding obligation of reciprocal compensation. Despite the foregoing, some forums have interpreted the issue to require reciprocal compensation to be paid. This produces the situation where the cost of providing the service is not cost based under Rule 809 or paragraph 1318 of the First report and Order. As a result, that portion of the contract pertaining to reciprocal compensation is not available under this 252(i) adoption. In its place are provisions that exclude ISP Traffic from reciprocal compensation. Specifically, the definition of "Local Traffic" includes this provision: "Local Traffic excludes information service provider ("ISP") traffic (i.e., Internet, 900 – 976, etc)"

In sum, GTE's proposal as described above would maintain the status quo until the legal landscape is settled.

Sprint's adoption of the AT&T arbitrated agreement shall become effective upon filing of this letter with the Washington Utilities and Transportation Commission and remain in effect no longer than the date the AT&T arbitrated Terms are terminated. The AT&T arbitrated agreement is currently scheduled to expire on September 25, 2000.

As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of the Terms or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Terms, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant to arbitration in Docket No. UT-960307, or to seek review in any way of any provisions included in these Terms as a result of Sprint's 252(i) election.

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or Sprint that any contractual provision required by the Commission in Docket No. 960307 (the AT&T arbitration) or any provision in the Terms complies with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commissions, the decisions of the courts, or other law, and both GTE and Sprint expressly reserve their full right to assert and pursue claims arising from or related to the Terms. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the Court's decision of January 25,1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals.

Should Sprint attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

(A) Sprint adopts the Terms of the AT&T arbitrated agreement for interconnection with GTE and in applying the Terms, agrees that Sprint be substituted in place of AT&T in the Terms wherever appropriate.

(B) Sprint requests that notice to Sprint as may be required under the Terms shall be provided as follows:

To: Sprint Communications Company, L.P.
Attention: W. Richard Morris
Vice President - Local Market Integration
7301 College Blvd - KSOPKVO2I4
Overland Park, KS 66209
Telephone number: 913/534-6102

FAX number: 913/534-6818

(C) Sprint represents and warrants that it is a certified provider of local dialtone service in the State of Washington, and that its adoption of the Terms will cover services in the State of Washington only.

Sincerely,

GTE Northwest Incorporated

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

Reviewed and countersigned as to points A, B, and C only:

Sprint Communications Company, L.P.

[CLEC signing party's name]

c: R. Ragsdale . HQEO3B7S . Irving, TX
R. Vogelzang . HQEO3J4I . Irving, TX
W.E. Munsell . HQEO3B62 . Irving, TX

DECLARATION OF KEVIN E. BRAUER

I. Introduction.

I will explain the plans Sprint has to compete with the ILECs and why, at least in the near term, it is critical that ILEC facilities be available as Unbundled network elements. Before providing these explanations, I will briefly set forth my relevant experience in the telecommunications field. I am the President of Sprint's National Integrated Services organization. As President of this organization, I am responsible for implementing Sprint's new, innovative, state-of-the art technology platform and service. Sprint recently announced this new platform and service - Sprint ION, Sprint's Integrated On-demand Network. Additionally, I am familiar with Sprint's other, non-Sprint ION, CLEC strategies.

I have held my current position for the last year and a half. Before that, I was the President of Sprint Business, the group responsible for serving Sprint's larger long distance business customers. I have also served as a Sprint senior vice president responsible for developing and implementing strategies related to emerging growth opportunities and held various vice presidential level marketing assignments.

II. Sprint ION Deployment

The Telecommunications Act of 1996 encourages both the development of competition in local exchange markets and the deployment of advanced services to consumers residing in the United States. Sprint ION assists in meeting both goals: it brings competitive communications offerings to current local exchange carrier (LEC) monopoly customers and it does this through the use of advanced technologies created for the data age rather than the technologies used in the provision of yesterday's plain old telephone service.

The networks and technology deployed by traditional telephone companies, both local and long distance, rely upon circuit switches to route both local and long distance voice traffic using a time division multiplexing (TDM) technology. While voice traffic is the bulk of the communications traffic today, data traffic is increasing rapidly. We are experiencing a rapid growth in use of the Internet and the developing capability of converting voice TDM traffic to a data format that can be carried on more modern data networks. Data traffic is growing at a much more rapid pace than traditional voice traffic and is expected to be the bulk of the communications traffic in the near future.

Sprint's new ION service integrates traditional voice TDM traffic, Internet traffic, Frame Relay traffic, and other data traffic on one customer access facility and carries all of this traffic in the asynchronous transfer mode (ATM) data format through the Sprint network. The initial conversion of these various formats takes place at the customer premises where all of the traffic is converted to ATM and transported to Sprint's network for delivery to the terminating point.

Sprint ION service will be capable of carrying the traffic of Sprint ION customers over any distance, whether the communication is delivered within a city, across a state, or across the nation. For communications terminating to end users that are not Sprint ION customers, Sprint will convert the Sprint ION format to the format needed to communicate with the off-net non-Sprint ION customer.

As Sprint deploys Sprint ION, it will focus customers on the efficiency gained by integrating all services on one access facility, increased functionality provided to customers through increases in bandwidth, and innovations in customer control by providing the customer with easy-to-use service configuration functionality. For example, a residential customer will have the capability to create up to six voice communications channels where only one existed before and greatly increase the data throughput speed of

its access to the Internet and other data applications. Configuration choices will be available to the customer through an easily used computer-based program.

For businesses large and small, the Sprint ION technology enables networked multimedia applications that efficiently link employees, customers, and external partners by providing virtually unlimited bandwidth to all work locations. This will facilitate E-Commerce to help reach new markets; interactive distance learning for employees at all locations; management of a telecommuting and/or geographically dispersed workforce; and real-time video desktop collaboration, connecting both internal and external participants at multiple locations.

III. The Need for ILEC UNBUNDLED NETWORK ELEMENTS

Sprint's preference is to self-provision all of the facilities and functionalities necessary to bring Sprint ION, as well as POTS, to that national marketplace, even if self-provisioning proves somewhat more costly than relying on external carrier-competitors. Self-provisioning allows control over one's destiny by providing the ability to provision distinguishable services, rather than being bound by the capabilities inherent in the facilities that other entities deploy. Self-provisioning produces tremendous efficiencies because the business can be run in-house, as opposed to being managed through multiple vendors and multiple, and varying, processes throughout the nation. Additionally, better financial results, over the long run, should be achievable by increasing the return from capital dollars spent rather than continuing an expense to multiple third parties. Finally, dependence on external vendors increases the business uncertainties and risks in terms of possible pricing fluctuations, quality control, choice of vendors, changes in vendors' business strategies and/or control of the vendors – many of whom are also competitors. These advantages are such that Sprint would choose self-provisioning even if it were somewhat costlier than using external carriers as suppliers.

Sprint is engaged in some degree of self-provisioning through its acquisition of three wireless cable providers through which Sprint will be able to deploy Sprint ION to certain customers. These wireless cable providers pass 24.2 million households. However, because the wireless cable technology is line-of-sight based, not all of these 24.2 million household can actually be served by the wireless cable. Additionally, while the wireless cable bandwidth will be suitable to provision service to residential and small business customers, it is not sufficient for the needs of large businesses. Clearly then, the wireless cable play is not a short-term complete self-provisioning solution.

Self-provisioning of all of the necessary facilities and functionalities is not a viable option in the near term for widespread deployment, and may never be a viable option in certain parts of the country. It is, even for a company of Sprint's size, extremely costly and capital intensive. It is also extremely time consuming and does not lend itself to anything remotely resembling rapid deployment. Some parts of the country are very remotely populated and in these areas self-provisioning of more than a few items may never be economically viable. Finally, certain facilities – such as a second physical wireline to the customer premises, may be impossible in some circumstances due to zoning laws, deed restrictions, easement problems, etc. Even where self-provisioning may be feasible in the future, it is often more economic to enter the market first by employing unbundled network elements, to build a base of customers that later might support a facilities build-out.

There is no robust, or even nascent, wholesale market for the facilities and functionalities that the ILEC unbundled network elements provide, and that are necessary for local competition to develop and flourish. Indeed, it will undoubtedly be some time before there is a viable wholesale market. The ILECs have had a monopoly in local telephone service for years. As of a result of this monopoly, the ILECs have economies of

scope and scale that wholesale competitors will have difficulty matching, if they ever can, for a number of years.

Unfortunately, that leaves the ILECs as the only real source of external supply. There are no other viable alternatives, there is no wholesale market, no competitive alternative sources, for the facilities and functionalities that the ILEC unbundled network elements provide. If there were, Sprint would use it. The simple fact is that the ILECs will be Sprint's major competitor for local service. Additionally, when the RBOCs are allowed into interLATA long distance, the RBOCs have the potential to be one of Sprint's largest long distance competitors. It makes no business sense to further the RBOCs' interest and help them increase their margins -- margins that can be used to compete with Sprint -- if viable alternatives exist. But as of now they do not. In my business judgment, the very fact that Sprint turns to the ILECs for unbundled network elements means that they are necessary to Sprint's business and their absence would materially impair Sprint's ability to offer its services.

Thus, as a matter of long-term business strategies for Sprint, the ILECs are the least desirable external source of supply. Yet they are a source that Sprint must initially tap, through the purchase of unbundled network elements, if Sprint's CLEC strategies are to be successfully deployed.

I hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief. Executed this 25th day of May, 1999.

/s/ Kevin E. Brauer

Kevin E. Brauer

SPRINT'S PROPOSED RULE CHANGES

1. Amend §51.315(b) by adding at the end of thereof an additional sentence to read as follows:

If an incumbent LEC, on its own initiative, combines particular elements in one location or for one particular retail customer, it shall offer such combination of elements to requesting carriers for service to other customers anywhere in its operating area(absent a showing of technical infeasibility with respect to a particular customer location or a particular end office).

2. In the event that paragraphs (c)-(f) of §51.315 are not reinstated, amend §51.315 by adding a new paragraph (c) to read as follows:

(c) If an incumbent LEC refuses a requesting carrier's request to combine network elements, the incumbent LEC must allow the requesting carrier to combine the network elements by the most economical means possible without requiring the requesting carrier to duplicate the incumbent LEC's existing equipment infrastructure, and cannot require the requesting carrier to collocate for this purpose. Any physical access to incumbent LEC premises needed by the requesting carrier for the purpose of combining network elements must be allowed, subject to reasonable security measures and without any charge to the requesting carrier (other than a reasonable charge for such security measures).

3. Amend §51.317 by revising paragraph (b), and adding a new paragraph (c) to read as follows:

(b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to the network element on an unbundled basis, the state commission may decline to require unbundling of the network element only if it concludes that:

(1) with respect to an element that is proprietary (or contains proprietary information that will be revealed if the network element is unbundled) access to such element is not necessary to the requesting carrier; or

(2) with respect to non-proprietary network elements, the failure to provide access to such element will not impair theability of the requesting carrier to provide the services that it seeks to offer.

(c) For purposes of making the determinations required by paragraph (b) above:

(1) A proprietary unbundled network element is *necessary* if requesting carriers do not have available, from the incumbent or others, a reasonable substitute for such proprietary element that enables an efficient competitor to provide a telecommunications service in an economically and functionally viable manner, taking into account the economic and functional characteristics of the proprietary element.

(2) Requesting carriers' ability to offer a telecommunications service is *impaired* if their inability to obtain a requested unbundled network element materially reduces their ability to offer the service. For purposes of this rule, the ways in which requesting carriers' inability to obtain an element may materially reduce their ability to offer a service include, but are not limited to, effects on the quality (including functionality), scope, or timeliness with which the service could be offered and the costs required to offer the service using a substitute functionality.

(3) Factors to be considered in determining whether access to a proprietary unbundled network element is necessary, or whether requesting carriers' ability to offer service is impaired, include, but are not limited to:

(A) Availability of substitute capabilities from the incumbent or other sources;

(B) Whether a substitute capability requires requesting carriers to incur higher deployment costs or lower economies of scale compared to those of the requested element;

(C) Practical difficulties in obtaining business arrangements necessary to obtain any substitute capability within the timeframes and in the quantities required by requesting carriers;

(D) Reduced potential for requesting carriers to serve an equally broad base of customers using the substitute;

(E) Additional time necessary to deliver services in the marketplace that is related to the requirement to obtain and implement the substitute;

(F) Inferior functionality or performance of, or support capabilities for, the substitute compared to the requested element; and

(G) Diminished ability of requesting carriers to provide service in conformity with their legal and regulatory obligations.

4. Amend §51.319 by revising paragraphs (a), (c) and (d) as follows:

(a) *Local Loop.* The local loop network element is defined as a transmission path from the main distribution frame (or its equivalent) in an incumbent LEC's central office, wire center or remote switch or concentration location up to, and (at the option of the requesting carrier) including, a compatible Network Interface Device at a customer's premises, and between the main distribution frame in the central office or wire center and the remote switch or concentration location. This includes (but is not limited to) two-wire and four-wire loops that are conditioned to transmit the analog and/or digital signals needed to provide services such as ISDN, xDSL, and DS1-level signals. This also includes DS-3, OC-n and STS-n loops. A carrier may also request conditioned loops for telecommunications services requiring loops unfettered by any intervening equipment (e.g., filters, load coils, range extenders, bridge taps, etc.), so that the requesting carrier can use these loops for a variety of telecommunications services that can be supported by use of copper by attaching appropriate terminal equipment at each end. When such loops are not available as a result of (a) a lack of facilities, (b) the presence of incompatible intervening electronics, or (c) other constraints, including but not limited to the inadequate electrical characteristics of the loop, then the incumbent LEC must provide a loop that is equipped with all transmission equipment necessary to provide equivalent communications capabilities as the incumbent LEC makes available over loops of equivalent length between a customer's premises and the traditional serving central office of that customer's premises. This obligation applies regardless of whether the incumbent ILEC's offering is made as a retail service or as an access service and regardless of whether the incumbent LEC or an incumbent LEC affiliate provides such service. The loop also includes the transmission media and, where deployed, the associated transmission functionality including, but not limited to, coding and decoding, multiplexing and de-multiplexing, modulating and demodulating, and loss or gain insertion. When such functionality is provided by a digital subscriber line access multiplexer ("DSLAM"), the DSLAM may be requested on a dedicated or shared basis. When the incumbent LEC deploys "next generation" digital loop carrier ("NGDLC") that allows the placement of xDSL line cards and remote xDSL functionality, such NGDLC functionality shall be unbundled and offered separately if requested by the carrier.

* * * * * *

(c) *Switching Capability.*

(1) Local Circuit Switching Capability. * * *

(2) Tandem Circuit Switching Capability. * * *

(3) Packet Switching Capability. The packet switching capability network

element is defined as the assembling, dissembling, addressing, conversion or routing of digital information in packet form. The packet switching capability network element shall include all features, functions and capabilities of the packet switching and/or routing device. For this purpose, packet switching includes (but is not limited to) all types of cell or

packetized information, including asynchronous transmission mode (ATM), and Internet protocol (IP).

(d) * * *

(2) The incumbent LEC shall provide a requesting telecommunications carrier use of packet transport defined as the transport of packetized information between (and including) two or more packet devices, or between interconnected transmission facilities which terminate at a packet device, including any intermediate routing, without regard to the protocol or packet definition scheme involved. The packet transport network element shall include all features, functions and capabilities of the incumbent LEC's packet transport network.

APPENDIX D

I. Sprint Experience with BellSouth

Beginning in 1996, Sprint began a CLEC initiative in the Orlando, Florida area. Sprint's market strategy was to offer competitive local exchange service in BellSouth's Orlando market via the deployment and utilization of a Sprint-owned #5ESS switch, which is physically located on floor space leased from a third party (not BellSouth) but centrally located among eight BellSouth central offices in the Orlando area. Sprint combined its own local switching functionality with unbundled loops from BellSouth to offer retail local service.[34] Since the inception of the venture, Sprint has amassed a wealth of experience attempting to efficiently operate in this "two-network" mode. To say the least, the process remains complex, costly and inefficient in virtually every regard relative to a seamless, one-supplier UNE provisioning environment.

From its inception, this initiative has been staffed and operated by seasoned, competent employees with extensive experience in local telephone operations. Thus, lack of telephony knowledge can not legitimately serve as an excuse for the numerous and continuous hurdles that are experienced in this "two network" provisioning environment. Despite this experience, and despite almost continuous quality improvement efforts on the part of Sprint (and BellSouth), the situation has improved incrementally to now be considered by Sprint to be operationally tolerable at best.

As a precursor, BellSouth has historically had a policy of not allowing the collocation of circuit switching equipment of the type required by Sprint (Sprint's #5ESS local circuit switch)[35]. At the time Sprint was deploying its switch, and prior to the recent FCC Order on collocation, BellSouth (or any ILEC, for that matter) was not required to allow collocation of circuit switching equipment.[36] Even though offering competitive services via the utilization of multiple networks

[34] Sprint also utilized its own SONET ring that encircles Orlando, along with certain transport elements from BellSouth.
[35] Sprint has physically collocated a point of termination (POT) frame multiplexing equipment in two of the eight BellSouth end offices it serves.
[36] In fact, physical collocation of CLEC switching equipment will be nascent today in most, if not all markets, due to the historical absence of any regulatory requirement for the ILEC to allow collocation of circuit switching equipment.

has complexities of its own that altogether impair a CLEC's ability to compete effectively, having to do so via a remotely placed switch further impairs this ability.

Cost Impairment

From a cost standpoint, in each instance where service is provided through the utilization of a BellSouth unbundled loop and a Sprint switch, Sprint has to incur the cost of extending that BellSouth-provided loop beyond that loop's natural termination point at the BellSouth main frame to a termination point at the Sprint switch. The transmission facilities ranged from a minimum length of 3,000 ft. (from the BellSouth Magnolia St. central office to the Sprint switch location) to as much as 20 miles. Even in the Magnolia St. C.O. instance, the associated transmission cost is well above and beyond the cost of an analogous and simple cross connect which would be required if BellSouth were to provide unbundled local loop and switching functionality for Sprint's use. Also, because of BellSouth's policy of requiring that Sprint have an intermediate termination point between its main distribution frame and the Sprint frame, Sprint bears the cost of placing (either through physical or virtual collocation) an intermediate point of termination ("POT bay") in each central office where Sprint intends to utilize unbundled loops. The cost of collocation and placement of the POT bay is clearly a cost disadvantage vis-à-vis a fully provisioned BellSouth network solution.

Operational Impairment

Sprint has experienced and has attempted to rectify numerous impairments to operational efficiency, and will not burden the record with the complete litany. Rather, the focus here is on certain operational issues that arise as a result of the "two network" scenario presented here. Specifically, there have been countless instances where coordination of facilities availability, test, and turn-up between Sprint and BellSouth have gone askew for reasons ranging from missed

commitments (e.g., the loop is not ready at the time it was promised), to BellSouth positive loop tests that proved to be incorrect, to the operational incompatibility of Sprint's 5ESS switch with BellSouth's pair gain devices – and everything in between. This situation has seen some incremental improvement since the inception of the venture, but not without paying a significant price in the form of resources. Specifically, Sprint now "project manages" the entire ordering/provisioning process of each order. Sprint assigns individuals to oversee both the Sprint side as well as the BellSouth side of each transaction to ensure, for example, that facilities availability commitments are met, changed due dates are mutually understood and adhered to, and testing is validated and confirmed. Further, the Sprint project manager must coordinate multiple orders, as each company utilizes different systems to place orders for engineering, installation, maintenance, and billing of services, and must document the circuit/service ID's used by each company to identify each network component. This very specific "cross-referencing" that occurs enables Sprint to approach problems in this "two network" environment in a coordinated and more efficient fashion. All that said, despite this very labor-intensive micromanagement approach that Sprint has taken, Sprint continues to struggle with customer-impacting problems all the time, because the project manager never has full visibility to things occurring on the BellSouth side of the "two network" operation. In contrast, were BellSouth to provide the full range of UNEs end-to-end and retain full visibility and accountability for the entire physical plant, the complexities and inefficiencies of managing two network providers would be eliminated.

Quality Impairment

When Sprint and BellSouth devise a provisioning solution utilizing leased transport between the Sprint switch and BellSouth end offices (as is often the case), the switch service may convert between analog and digital signaling numerous times in the transmission process, depending on the type of transmission and outside plant facilities used by both providers. As a result, the service may not achieve a quality of service available if BellSouth were provisioning the entire service. For example, a simple analog business or residential line fully provisioned by

BellSouth and used by a customer as a modem line for dial access to an internet service provider can (and routinely does) achieve speeds approaching 56 Kbps. In the "two network" environment, the jointly provisioned solution will, by design, require several additional digital-to-analog and analog-to-digital conversions which result in slower connect speeds incapable of exceeding 19.2 Kbps or less. This service degradation is not the "fault" of either Sprint or BellSouth: it is a logical outcome, given the inherent requirements of transmitting between hardware that requires multiple conversions. The bottom line is that quality can suffer and actually has suffered to the point where Sprint has directed certain customers to switch back to BellSouth to achieve the quality service that they had experienced prior to the migration to Sprint.

With respect to timely resolution of trouble, the customer experiences delay simply due to the need to isolate trouble numerous times before the root cause can be identified with certainty and rectified. When it receives a trouble report, Sprint's process is to first do what it can to isolate trouble on its own. If Sprint isolates the trouble as being in the BellSouth network, it will submit a trouble ticket to BellSouth, which will then perform a second trouble isolation test. If BellSouth finds the trouble, it can be rectified promptly, but still slower and less efficiently than if BellSouth were the end-to-end network provider. If, as often is the case, BellSouth finds no trouble, both parties then begin more detailed collaboration and testing, with the ultimate solution coming about in a much more inefficient manner than if BellSouth were the end-to-end network provider. In each instance of trouble, quality is clearly impacted in a negative way.

In summary, Sprint and BellSouth technicians enjoy a good and well-established working relationship where there is cooperation and collaboration as needed. However, this in no way overcomes the inherent complexities associated with providing service via the use of two physically separate and independently managed networks. For numerous reasons, replicating the operational efficiency, cost effectiveness, and quality of an end-to-end network solution is not practically viable at this point in the evolution of competition.

II. Sprint Experience with TCG/NYNEX

During 1997, Sprint conducted an unbundled network element trial wherein Sprint was testing the viability of offering a competing retail local dial tone product through the underlying combination of ILEC and third party network elements. Specifically, Sprint requested that NYNEX provide unbundled local loop facilities, and that TCG provide local switching functionality from its local circuit switch (which was physically collocated in a NYNEX central office) along with local transport functionality. If this had been more than a technical test, Sprint, as the retail service provider, would have had ultimate accountability for the timely, accurate, and cost-effective provisioning of its branded service to its retail subscribers. Even though the equipment of Sprint's two network suppliers was collocated in the same location, the impairment in the quality as well as the lack of timely provisioning of its retail offering was significant. Without a recitation of the litany of operational problems associated with the trial, Sprint will focus on one particularly illustrative example.

In July 1997, Sprint requested that seven subscriber circuits be converted from NYNEX retail to Sprint retail via the NYNEX/TCG joint provisioning arrangement. Upon completion of the conversion, Sprint observed that four of the converted lines were working but provisioned "out of order," i.e., the lines were mixed up and traffic was going to the wrong numbers between the four working lines. Further, the remaining three lines did not have dial tone. Unable to isolate the trouble on its own, Sprint subsequently submitted trouble reports to both NYNEX and TCG. In response to the trouble reports, both NYNEX and TCG denied ownership of any problem and supported their position with a claim that their respective portions of the network had tested successfully. The trouble reports remained unresolved due to NYNEX's and TCG's firm position that the problem was in the other party's network. It was not until September 8th, when Sprint brought its own technicians to New York and was given access by TCG to TCG's facilities to test both the transmission and the connecting block order of the telephone numbers, that Sprint itself was able to isolate the trouble. Specifically, Sprint's testing determined that TCG had turned up the service correctly on the four "out of order" lines. At that point, the trouble report on these four

lines was reissued to NYNEX. After repeated escalations and further investigation by NYNEX, NYNEX finally agreed that it had cross-connected the local loops to the point of termination in TCG's collocation cage out of order. Once this root cause was isolated (approximately 40 days after trouble was identified), the trouble was quickly and easily rectified by NYNEX. With respect to the three out of service lines, Sprint's testing revealed that TCG had provisioned these lines as "dial pulse" while Sprint ordered the lines as "digit tone" thereby creating a no dial tone condition. Again, once the root cause was isolated, the trouble was quickly and easily rectified by TCG.

Sprint acknowledges that operational difficulties are bound to exist as new processes related to competitive market entry are established. However, the significance of this particular scenario is that the complexities of installing service using two independent networks revealed the fatal flaw that no one network provider had end-to-end accountability for the proper functioning of the combined network. The persistent denial of fault would clearly not have occurred had NYNEX been the end-to-end provider of all unbundled network components – loop, switching, and transport. With problem resolution taking well in excess of a month, impairment in the form of timely availability of service, costly oversight (and ultimately hands-on trouble isolation) efforts by Sprint, and obvious degradation in service quality is readily apparent.

Regardless of the source of the problem, as a retail service provider, Sprint would have been ultimately accountable to its customers for any customer-impacting problem. However, being neither the underlying loop provider nor the underlying switching or transport provider, Sprint had no independent access to any portion of the network to exert any direct control over solving those problems. Further, Sprint had no real-time visibility to the status of the network in the form of electronic interfaces that would have made "viewing" the problems more readily apparent.[37]

[37] Nor, to Sprint's knowledge, does this real-time electronic interface exist today in a UNE environment.

Sprint is convinced that, at this time, removing the local switching component from the stream of network components, with the local switching component being provided by an independent entity, creates an environment that introduces significant potential for operational problems that result in lower quality, increased cost, and untimely service provisioning.

APPENDIX E

DECLARATION OF ROBERT RUNKE

I, Robert Runke, state as follows:

1. I am Vice President, Network Distribution, of Sprint's Long Distance Division ("LDD"). In this capacity, I am responsible, among other things, for the Sprint LDD's acquisition and use of access facilities from various access vendors. I oversee Sprint LDD's deployment of switched and special access facilities, including deployment of a Broadband Metropolitan Area Network ("BMAN") access architecture in target markets. Access consists of dedicated entrance facilities linking the Sprint LDD points of presence ("POPs") with the access provider's serving wire centers, interoffice transport facilities and local loop connections to the end user customer premises.

2. Sprint LDD has several years' experience using access facilities provided by competitive access providers ("CAPs"). Although CAPs generally offer their access facilities at a discount off the rates charged by ILECs, and although Sprint LDD has purchased entrance, transport (both switched and special), and local loop facilities from a diversified group of access vendors wherever it is economically and strategically feasible to do so, our use of CAPs has been limited.

3. I believe that Sprint LDD's use of CAP-supplied access to provide long distance service is relevant to this proceeding, which concerns use of UNEs to provide local service, for two reasons. First, CAP-provided switched transport is closely analogous, if not identical to, transport UNEs. Sprint LDD's limited use of CAP-provided switched transport service is due to some of the same factors (lack of ubiquity, inferior network quality) which account for the failure of a wholesale market (*i.e.*, non-ILEC provided) for transport UNEs to develop (see paras. 4-5 below). Second, Sprint LDD's experience using CAP-provided special access facilities has more often than not involved use of ILEC-provided access facilities as well to reach our end user customers. Thus, Sprint LDD is well aware of many of the problems which arise in multi-vendor situations (see para. 7 below) – problems which also will arise in combining UNEs obtained from different providers.

4. One reason for Sprint LDD's limited use of CAPs is the far less comprehensive coverage available from a CAP as compared to the ILEC. Sprint LDD chose a CAP as its preferred access vendor in five metropolitan areas: New York City, Denver, Charlotte, Miami and Fort Lauderdale. (We also make use of CAP facilities to a lesser extent in other cities as well.) Although we were willing to route as much of our special and switched transport traffic to the CAP as it could handle in those five metropolitan areas, the fact that the CAP was not collocated with a large percentage of the ILEC's serving wire centers and end offices forced us to continue to rely heavily upon the ILEC to get LATA-wide coverage for a significant portion of our traffic. Sprint LDD was able to use a CAP as its preferred provider of both switched transport and special access in only one city (New York City), and even there we were forced to use the ILEC to meet a substantial percentage of our dedicated access needs. In the other four cities, Sprint LDD was able to designate the CAP as our default carrier only for special access because the CAP did not have trunks to even the one-third of the LEC end offices where Sprint LDD uses dedicated switched transport.

5. Another reason for Sprint LDD's limited use of CAPs to meet our entrance and transport access needs is that the overall quality of CAP-provided facilities is lower than that of ILEC-

provided BMAN access facilities. In order to maximize network reliability and survivability, Sprint LDD has negotiated with ILECs to obtain four-fiber, bi-directional line-switched SONET rings, in which each working fiber has a fully protected fiber back-up, capable of handling 100% of the traffic in the event that the working-side fiber fails. In contrast, CAPs offer only very limited SONET ring-based access to customer locations, with some CAPs using single-path, asynchronous, even aerial, linear connections for their entrance, interoffice and loop facilities. The CAPs' use of these less-reliable facilities has a direct impact on Sprint LDD's provision of long distance service. For example, Sprint LDD has experienced significant access network outages involving CAP-provided aerial fiber in both Miami and Kansas City.

6. In evaluating the use of CAPs to meet our special access needs, Sprint LDD found that CAPs do not offer ubiquitous access to end user customer premises, and that CAPs are therefore forced to resell ILEC-provided customer loop connections ("Type II" arrangements). In contrast, the ILECs have almost 100% "Type I" coverage (*i.e.*, they provided all of the access facilities between their POP and the customer premises) by virtue of their historic monopoly access to all buildings in their franchise territory.

7. Where Sprint LDD does use CAPs to meet our special access needs, we have found that CAPs' lack of ubiquitous Type I access results in additional costs to Sprint LDD and our customers because of the need to manage multiple vendor operations:
   - **Administrative costs:** CAPs usually price Type II arrangements on an individual case basis, which results in some delay to determine the applicable rates and which requires Sprint to maintain multiple cost tables for the same end office and customer premises. Type II arrangements also involve additional circuit ID numbers, which requires that Sprint's ordering, provisioning and maintenance systems be able to automatically link the ILEC and CAP circuit numbers, and often requires that both the ILEC and CAP visit the customer premises to tag the IDs to the circuit. Type II arrangements often require manual provisioning and bill verification, since many CAPs do not conform to OBF standards; for example, they often send and receive access service requests ("ASRs") and firm order commitments ("FOCs") via fax machine, and render access bills on paper.
   - **Installation delays:** In 1998, ILECs met Sprint LDD's initial requested installation dates 90% of the time, compared to 56% and 42% for two CAPs. This is due at least in part to the fact that CAPs must rely upon the ILEC for facilities in Type II situations, and thus do not have complete control over installation dates. Installations become more complicated in Type II arrangements because there are three carriers (Sprint LDD, the CAP and the ILEC) involved; for example, two ASRs and two FOCs are needed (one set between Sprint and the CAP, and another set between the CAP and the ILEC). With Type I access, there is only one ASR and FOC. In addition, where the end user customer has special circuit installation or conversion needs, it is more complicated to coordinate CAP and LEC activities in Type II arrangements.
   - **Longer repair times:** In 1998, average repair time for one CAP's Type I service was 1.3 hours, compared to 3.7 hours for Type II arrangements. For another CAP, 100% of Type I failures were repaired in less than 4 hours, compared to less than 70% for Type II failures. As was the case for installation times, longer repair times are attributable in part to the CAP's need to coordinate with the ILEC.

- **Lack of diversity:** Customers that require route diversity or carrier diversity cannot meet these needs through Type II arrangements obtained from a CAP with respect to the access facility provided by the ILEC.

8. I believe that the problems associated with CAPs' lack of ubiquity, their reliance upon Type II arrangements, and their overall lower network quality, makes their use less attractive to Sprint LDD's end user customers. Our data show that only 43% of Sprint LDD's DS3 dedicated access customers, who are able to choose their access provider, have selected a CAP, even though the CAP's rates were lower than those charged by the ILEC.

9. Finally, in evaluating CAP offerings, Sprint LDD must consider the CAP's financial stability and its relationship with other IXCs. For example, the acquisition of TCG and MFS by AT&T and WorldCom (now MCI/WorldCom), respectively, poses strategic competitive concerns for Sprint LDD. The fact that ILECs are also current (intraLATA toll and out-of-region interexchange) and future (in-region interexchange) competitors of Sprint LDD also raises equally serious competitive concerns. However, given the ILECs' ubiquity and their generally superior network and service quality, Sprint LDD has little choice but to continue to rely (at least in the near-term) primarily upon ILECs rather than CAPs for special access, transport and loop facilities.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of May, 1999.

/s/ Robert Runke

_____

Robert Runke

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document in CC Docket No. 96-98 was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 26th day of May, 1999 to the parties listed below.

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